

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DANA CORPORATION d/b/a
DANA PERFECT CIRCLE

and

Case 7-CA-45869

INTERNATIONAL UNION, UNITED AUTOMOBILE
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL-CIO

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Judith A. Schulz, Esq., for the General Counsel.
Michael D. Carrouth, Esq. (Ellzey & Brooks),
of Columbia, SC, for the Respondent.
Carlos F. Bermudas, Esq., of Detroit, MI, for the Union.

DECISION

Statement of the Case

MARION C. LADWIG, Administrative Law Judge. This case was tried in Lansing, Michigan on June 25-26, 2003. The charge was filed by UAW (the Union) against Dana Corporation d/b/a Dana Perfect Circle (the Company) on February 3, 2003 and the complaint was issued March 27, 2003.

The Union's organizing campaign began at the Company's St. Johns, Michigan plant in March 2002.¹ Martin Feldpausch became a leading employee organizer after telling Plant Manager Richard Rinard, over a disputed discipline, "I will jump on the UAW bandwagon, and I will support it with everything I have." Rinard's response was, in effect, "You do what you have to do, and I will do what I have to do. In the meantime, this meeting is over."

In December, Feldpausch was attempting to reactivate the organizing campaign and get more union cards signed by discrediting the rumors of quality technician Larry Luttig, a leading opponent of the Union, that Luttig's father-in-law—a well-respected UAW member and community leader where many of the employees live—was against a union at the plant.

Meanwhile, Luttig reported this union activity to Rinard in "updates of what was happening," following Feldpausch's two private conversations with Luttig on December 9 and 12 and a third conversation at employee Jeffrey Simpson's work station on December 19.

Rinard suspended Feldpausch later that same day, December 19, for possible violation of five plant rules and the workplace violence rule in the handbook. The General Counsel contends that his discharge on January 7 was pretextual.

¹ All dates are from March 2002 to January 2003 unless otherwise indicated.

The principal issues are whether the Company suspended Feldpausch on December 19 and discharged him on January 7 because of his union organizing activity, violating Section 8(a)(1) and (3) of the Act.

5 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Company, and Union, I make the following

Findings of Fact

10 I. Jurisdiction

The Company, a corporation, manufactures piston rings at its facility in St. Johns, Michigan, where it annually receives good valued over \$50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

20 A. Background

About 2 weeks after Feldpausch attended the first union organizing meeting in March, he told Plant Manager Richard Rinard that he was "extremely unhappy" with Rinard's decision to uphold on Feldpausch's record an attendance "point" (15 of which can subject an employee to termination) for not coming in 2 hours early at 5 a.m. on his day shift and working 10 hours, even though the doctor excused him from the overtime because of a health problem at the time (Tr. 12-14, 40, 100-102).

30 It is undisputed, as Feldpausch credibly testified, that Rinard said that "if I was that unhappy with his decision that I probably ought to seek employment elsewhere." Feldpausch responded, "No, Rick, what I will do is I will jump on the UAW bandwagon, and I will support it with everything I have." Rinard then stated, in effect, "You do what you have to do, and I will do what I have to do. In the meantime, this meeting is over." (Tr. 14.)

35 Feldpausch signed a union card (GC Exh. 2), joined the UAW Volunteer Organizing Committee (GC Exh. 3), and every day for about 6 weeks wore two large union buttons, one stating "Support Your Local Union" and the other, "UAW Local 925 Voluntary Organizing Committee." He also passed out union flyers and about 30 or 40 union cards, took signed cards to union meetings, and became "probably the most active supporter we had." (Tr. 14-22, 167-168.) Rinard admitted he was aware of Feldpausch's union activity at that time (Tr. 427).

45 It is undisputed, as Feldpausch credibly testified, that in conversations he had with three of the supervisors (Coach-Supervisor Gerald Kohagen, Quality Engineer Mike Tiedt, and Manufacturing Manager Bruce Fandel), they told him essentially the same thing, that they felt the Union would cause the plant to lose customers and to shut down. When Feldpausch asked Tiedt "what have you been programmed to tell us concerning the union," Tiedt replied, "Well they can't really tell us what to say, but my own personal opinions are that it is going to cost more to make the ring, and my fear is that eventually our shop will be shut down, because we will lost contracts to other nonunion shops." (Tr. 27-30.)

50 At this time, quality technician Larry Luttig began spreading rumors about his father-in-law, Merle Braun, a UAW member who had been appointed by the local to represent his UAW

Local 652. One rumor was that Braun did not think the Company's wages, benefits, and retirement were far off from General Motors' and that a union would not do much good. To the contrary, as Feldpausch credibly testified on cross-examination, he believed that Braun "would never make such a statement," because the average line worker at GM makes between \$8 and \$9 an hour more, the GM retirement is probably twice as good, and GM benefits are much better. (Tr. 134-135, 276.)

After about 6 week, when the card signing slowed down, the union organizers "decided to cool things down for a while and wait" (Tr. 35).

About August or September, after the Company switched Feldpausch from the day shift (7 a.m. to 3:05 p.m.) to the third shift (11 p.m. to 7:05 a.m.), Coach-Supervisor James Kendall gave him a "coaching session" (a form of discipline less serious than an attendance "point") for leaving at 5 a.m. on a Saturday morning, to allow a day-shift employee to come in earlier to get his overtime work done. The employee had obtained the day-shift supervisor's written approval, "as done on a regular basis shop wide." (Tr. 36-40).

Kendall made no response when Feldpausch told Kendall that he figured the only reason Kendall was harassing him was an earlier incident during the union campaign (Tr. 37-39, also Tr. 21-25, 169-171). Feldpausch appealed to Manufacturing Manager Bruce Fandel, who sided with Kendall, and to Plant Manager Rinard, who said that the discipline on his record "would stand" (Tr. 39-40). As Feldpausch credibly testified (not denied by Rinard, Tr. 431-433), he told Rinard (Tr. 40-41):

I was sick and tired of Jamie [Kendall] and Bruce [Fandel] harassing me, because of my union involvement, and I wouldn't stand for it, and if need be, I would go over his head and speak with his boss in Muskegon.

About 3 days later—evidently upon direction from the Company, to avoid evidence of discrimination against Feldpausch for his union activity—Rinard told Feldpausch he felt that Kendall was out of line for giving Feldpausch the coaching session and he had instructed Kendall to erase it from Feldpausch's permanent record (Tr. 41). Rinard merely testified, "I talked to Jamie and that coaching session was removed" (Tr. 433).

After several unsuccessful union drives at the St. Johns plant (GC Exh. 16 p. 21, par. 7), the Company was understandably cautious about permitting conduct at the plant level that could appear discriminatory against a leading employee organizer in this latest UAW campaign.

B. December 19 Suspension of Union Organizer Feldpausch

1. Reactivated union organizing campaign and scheduled meeting

In early December, after several employees approached him about organizing again (Tr. 47), Feldpausch met with employees Gary Smeltzer, Kevin Parker, and three other union supporters and decided to reactivate the union campaign "for what was going on in the shop." After making the arrangements—with Mitchell Sanford, a UAW member who served as district shop committeeman for his local in Flint, Michigan, and with UAW Organizer Pat Manzo—Feldpausch advised these five employees that a "relatively secret" organizing meeting was scheduled for December 22 at the UAW hall. (Tr. 61, 68-69, 487; GC Exh. 11.)

Gary Smeltzer—then a union supporter—testified that he was "quite upset" over the Company's taking away the team leaders' (75-cent an hour) extra pay, which employee Jeffrey

Simpson had been receiving before his team-leader term expired. Smeltzer testified that he had taken over (some of the) team-leader duties, that "I'm a full-time student," and "I wanted to be compensated for my extra time I was going to be spending on team leadership responsibilities." (Tr. 61, 342-343, 391, 514.)

5

Although having worked in the plant about 5 years, Smeltzer at that time was working again as an apprentice, after his first apprenticeship was taken away in February 2001 as a result of the Company's outsourcing (Tr. 393-394; GC Exh. 16 p. 8).

10

2. Feldpausch's continuing union activity

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Meanwhile, Kevin Parker told Feldpausch that "our biggest hurdle" in reactivating the union campaign is to control the false rumors that Larry Luttig was circulating in the shop about his father-in-law (Braun). Feldpausch guessed that 30 percent of the work force comes from nearby Fowler, Michigan and the surrounding area where Braun lives. Because Braun is a UAW member who is a well-respected community leader, Feldpausch believed that "if the people in our shop were under the impression that [Braun] didn't think a union was good for our shop . . . they, of course, weren't going to sign cards." (Tr. 64-66, 172-173, 179-180.)

20

Therefore, coping with this rumor problem was Feldpausch's top priority in reactivating the organizing effort.

25

As Feldpausch credibly testified, he spoke first (on December 9) to quality technician Luttig in the Metallurgy Lab and asked "Could you tell me your father-in-law's position on a union in our shop?" Luttig answered that his father-in-law "didn't feel that our wages, or benefits, or our retirement were that far off from General Motors', and in a nutshell, he didn't feel it would do a bit of good in our shop." (Tr. 67-68.)

30

According to Luttig, Feldpausch came into his lab on December 9 and asked, "can I speak to you for a couple of minutes?" Luttig testified that in the conversation, Feldpausch asked if he had any conversation with his father-in-law regarding a union coming to the Dana plant in St. Johns. Luttig answered, "Basically, [Braun] said judging on what he heard us talking, myself and other family members and people he has heard in the past that he knows work there. . . . It sounds like your wages and benefit package are based on other local shops around here, some union and some nonunion plants within the Dana Corporation" and "what exactly do you hope to gain by having a union come in?" (Tr. 315-317.)

35

Thus, according to both Feldpausch's and Luttig's accounts, this private conversation in Luttig's lab was quite friendly.

40

Feldpausch admitted asking at the end of the conversation, "Just out of curiosity, what is your father-in-law's real name?" (Feldpausch and Braun had gone to the same high school, but "I hadn't spoken to Mike Braun since probably 1980 or 1981.") In fact, Feldpausch wanted to know how to contact Braun. Luttig answered that Mike Braun's real name is Merle. (Tr. 68, 131.) Similarly, Luttig testified that as Feldpausch started to leave, he stuck his head in the door, said he had not seen Braun in a long time and could not think of his first name, and Luttig said Mike Braun's real name is Merle (Tr. 317).

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Feldpausch contacted committeeman Sanford and UAW Organizer Manzo and told them he wanted a fax or e-mail from Braun, or to arrange for Braun to come to a union meeting in person, to discredit what Luttig was saying about Braun (Tr. 68-71, 487-489). Feldpausch also tried to call Braun and left a message, but Braun never answered his call (Tr. 132).

Instead of Sanford following Feldpausch's request, however, Sanford informed a union official what was happening (Tr. 489-490) and Braun was called into a meeting and questioned.

5 On December 12, Luttig approached Feldpausch at his machines and asked to speak to him in private. A few minutes later, Feldpausch went to Luttig's office where they talked (Tr. 73-74, 319.)

10 Luttig testified that his wife had told him that Braun had called her and said he had just been "called into a meeting to defend himself about a complaint that the Union had received from a Marty Feldpausch in the Dana Corporation, saying that Mike Braun was cutting down the Union" (Tr. 318).

15 Luttig further testified that he told Feldpausch "I just wanted to call you in here and personally thank you for stabbing me in the back and using me to get my father-in-law's name, to use me to get at my father-in-law." Luttig then claimed that Feldpausch said, "I guess I made a mistake. I should have approached that differently, I approached that wrong" and apologized a total of four times (Tr. 319-321.)

20 Feldpausch testified that Luttig said he felt betrayed, that Feldpausch had gone behind his back, and that he felt Feldpausch was a back-stabber. Feldpausch agreed that he apologized to Luttig four times but, as he credibly testified, it was not for misleading Luttig into telling him Braun's given name. He apologized for the way things turned out—getting Braun called in and being questioned by a union official—and told Luttig that it never was his intention
25 to get Luttig's father-in-law in trouble. (Tr. 74, 136-137.)

Thus, both Luttig and Feldpausch testified that it was Luttig, not Feldpausch, who originated this second conversation, which was held in Luttig's office, not on the shop floor, and that Luttig was doing the complaining to Feldpausch, who was on the defensive and repeatedly
30 apologized. There was no indication that either Luttig or Feldpausch was acting improperly or hostilely in that private conversation. Feldpausch made it clear that he was engaging in union activity, trying to discredit Luttig's false rumors in the organizing campaign.

3. Feldpausch's union activity reported to Plant Manager Rinard

35 The Company was being fully advised about what Feldpausch was then doing in his organizing efforts. When Luttig was called as a defense witness and asked if he ever forwarded anything to the Company "regarding this situation with Mr. Feldpausch," Luttig revealed that he gave the Company (presumably Plant Manager Rinard) "updates on what was happening" in the
40 December 9 and 12 conversations, as well as in the third conversation on December 19. Luttig confirmed that Feldpausch apparently thought that he was spreading false rumors that his father-in-law was "cutting the Union down, degrading them." (Tr. 313.)

45 I find that Luttig made these reports directly to Rinard, particularly because Luttig, upon returning to the plant at 10 a.m. on the December 19 day shift, reported directly to Rinard about Feldpausch's conversation with him earlier that morning on the December 18-19 night shift regarding Luttig's latest rumor in the plant, as discussed below.

50 Rinard obviously knew, from these "updates" on Feldpausch's efforts to discredit Luttig's antiunion rumors, that Feldpausch's purpose was to get more union cards signed in the organizing campaign. Feldpausch would have had no other purpose for his efforts to discredit the rumors.

4. Feldpausch's idea log

The Idea Program is a corporate requirement that the management try to "promote environments for people to input ideas that are improvements to the plant facility." The
 5 "corporate expectation is two ideas per person per month with an 80 percent implementation rate" for the year-end payout. (Tr. 49-50, 239-240.)

The practice at the St. Johns plant, however, was to permit employees to submit a total of 24 acceptable ideas by the end of the year, even all in one day, to be eligible for the payout.
 10 Lead Manufacturing Manager James Smania testified that "we told anyone that we discovered did not have" the 24 total and "tried to encourage them and let them know they still had a few days to get some additional ideas in so they would qualify." (Tr. 256, 260; R. Exh. 3 pp. 1, 11, 17, 22). It was merely a voluntary program, not a condition of employment.

15 Before Feldpausch's third conversation with Luttig about his antiunion rumors on December 19, Feldpausch submitted on the computer, from December 13-18, a total of 23 ideas toward the 24 ideas required for the payout (GC Exh. 5; R. Exh. 1; Tr. 49-52, 239-240, 274).

20 Examples of Feldpausch's ideas are (1) an idea to improve communication and team environment by allowing a union to come in; (2) an idea to have more paid holidays to keep up with GM and another union employer; (3) an idea to restore the extra pay for team leaders; (4) an idea that "if we are going to continue this silly assed idea system [permitting employees to submitting all 24 ideas at end of year, instead two each month during the year], a person needs
 25 to be hired who has the competence to keep it up and running"; (5) "scrap idea log system[,] too much time is wasted at terminals that could be spend producing parts"; (6) three separate ideas, to replace Plant Manager Rinard "with just about anyone so that our open door policy can actually work without all the red tape and twisted logic that goes [a]long with his thinking," and to replace Human Resources Manager Barbara Peterson and Manufacturing Manager Fandel; (7)
 30 an idea that "any person above the rank of coach should be fired immediately when they have been found guilty of having an affair, especially if the person is married [without naming anybody], no referrals should be given, all compensation ta[ken away]"; (8) an idea that "any investigation of harassment charges should be handled by an OUTSIDE source"; and (9) an obvious joke, that the Company should schedule (Feldpausch's lifelong friend) Supervisor
 35 Gerald Kohagen, "for a makeover on the Oprah Show" because "he gets uglier every year, his ugliness is extremely distracting" (GC Exh. 5; R. Exh. 1; Tr. 53-54, 58-60, 113-123, 204-205, 215-216, 295-297).

40 The Company states in its brief (at 8) that "it is important to understand that the Company was not objecting to Feldpausch criticizing the Company or plant management."

On the morning of December 17 (on the December 16-17 third shift), as Feldpausch credibly testified on cross-examination, Kendall "told me that all but a couple of my ideas were going to be rejected, and when I asked him why, he said the following night, I should be seeing
 45 something on the board (Tr. 128-129).

That night (on the December 17-18 third shift), Feldpausch saw on the main bulletin board a one-page notice entitled "Idea Program Guidelines" (GC Exh. 7), which stated toward the bottom of the page, "Abuse or misuse of the Idea Program will be handled on an individual
 50 basis." Previously, a large sign measuring about 4 feet by 12 feet, posted on the wall in Conference Room C, entitled "Rules for Brainstorming," had been used by employees as criteria for putting ideas in their idea logs. (Tr. 53-54, 111, 176-177, 205-206; GC Exh. 6.)

Feldpausch had never seen the Idea Program Guidelines before (Tr. 128). It is undisputed, as Feldpausch also credibly testified (Tr. 128), that the document had never been posted on the main bulletin board (Tr. 128, 176-177, 205-206, 241-244, 474-475). Copies had been placed from time to time "on a table near the entrance hallway" and posted in a conference room for team meetings (Tr. 242, 246). No employees had ever been suspended or terminated for their ideas in the Idea Program (Tr. 174-175, 204-205, 267).

Meanwhile, Simpson's term as team leader expired, the Company did away with the 75-cent incentive for team leaders, upsetting "pretty much everybody," and the team was dissolved. Simpson testified that he and (apprentice) Smeltzer picked up some Idea Program functions (Tr. 341-343).

About December 12 or 13, Simpson copied from the computer the idea lists of the seven or eight members of his former team, to let them know how many more ideas they need to qualify for the year-end payout. Feldpausch's list was blank, except for the name, and Simpson said he would need 24 ideas by the end of the year to get the payout. (Tr. 343-345.)

After Feldpausch enter his partial list on the computer, as discussed later, he not only found that Simpson had gone into his idea list on the computer, but he also heard that Simpson was distributing copies of the list to employees around the shop. As employee Lorraine Weber testified (Tr. 415-416), Luttig was one of the employees showing Feldpausch's idea log in the shop. There is no evidence how Luttig obtained the list, other than from Simpson.

5. December 19 conversation with leading union opponent Luttig

The morning of December 19 (on the December 18-19 third shift), Feldpausch heard about another Luttig rumor regarding his father-in-law. As Feldpausch credibly testified (Tr. 75):

It got back to me that Larry had said that when his father-in-law got done with that bitch, [UAW Organizer] Pat Manzo, that she wouldn't believe a fucking word that me or anybody else associated with the Union had to say.

Soon afterward, Feldpausch went to the computer to log in some production and found that the computer was down. On the way to ask Simpson, his former team leader, what was wrong with the computers, Feldpausch saw Luttig talking with Simpson. Feldpausch credibly testified that as he was walking by Luttig, he smiled, pointed at Luttig, and jokingly said, "I have got a bone to pick with you, Mister." He explained, "I've known the man my entire life, and that's how we talk to each other." (Tr. 75-76, 140, 512-513.)

After Simpson responded that the network was down, Feldpausch returned to the computer, removed his clock number, and then went back and talked with Luttig. (Tr. 76-77, 140-141.) When asked what he said to Luttig, Feldpausch credibly testified (Tr. 77-78, 516):

Q. And what did you say?

A. I said, "Larry, what kind of rumors are you circulating pertaining to your father-in-law now?"

Q. And did he respond?

A. He said, "I don't know what you are talking about."

Q. And did you say anything in response?

A. Well, I tried to refresh his memory. I said, "You repeated these rumors tonight and it got back to me very quickly, that when your father-in-law got done with Pat Manzo, that she wouldn't believe a word that me and anyone else had to say."

He responded by saying, "I don't know what you are talking about."

Q. Did you say anything in response, at that point?

A. We continued to talk for a little bit more . . . I could see I wasn't getting anywhere with Larry . . . he wasn't willing to admit anything, so before I left . . . I did speak with him a little bit more.

Q. And what did you say, at that point?

A. He kept denying everything . . . so I said, "Look, Larry, if there is one thing I have learned, after 20 years of working here, it is this: The best form of rumor control is the truth, [I have some phone calls to make] and "I will have this situation resolved when I get in to work tonight."

As Feldpausch further testified (Tr. 78-79):

A. My intentions were, at that point . . . to get ahold of either Mitch Sanford or Pat Manzo and see if they could get a fax or an e-mail from Mike Braun, and bring it into work that night, to show that everything that Larry had been saying about his father-in-law was indeed not true.

Q. Now, during this conversation with Larry Luttig, were your voices raised?

A. Oh, no. We have to talk a little bit loud because it is a shop environment, but no, we weren't yelling or screaming or cussing or anything.

Simpson, the only person who overheard the conversation, testified that Feldpausch said "he's going to make some phone calls" and "that they would settle this [to]night" (Tr. 355), or "getting it straightened out" (Tr. 360).

When called as a defense witness, Luttig was not asked what was said in the conversation. Instead he was asked to related what he reported to Plant Manager Rinard later that morning about what happened (Tr. 301-311). In that report, Luttig told Rinard (Tr. 304) that Feldpausch said, "I am going to make some phone calls, you and I will straighten this out tonight. I am going to make some phone calls and find out . . . what your father-in-law is saying is or isn't true. . . . we will get this straightened out tonight" and he turned and left.

6. Feldpausch's report to Supervisor Kendall

After the lunch break that morning, December 19, Feldpausch went to the supervisors office to complain to Kendall about Simpson, who was no longer his team leader, looking at his idea list and circulating his ideas around the shop. During the discussion, both Simpson and later Luttig were present, as well as Ryan Lynch, who was another third-shift supervisor, and employee Gary Smeltzer. (Tr. 80, 362.) As indicated above, Smeltzer was one of the five union supporters who met with Feldpausch in early December and decided to reactivate the union campaign. But at some point Smeltzer turned against the Union, as discussed later.

Feldpausch, pointing to Simpson, told Kendall, "I would prefer not to have certain people looking at my ideas and circulating them around the shop." After a discussion, Kendall said that if Feldpausch did not want Simpson assessing his files anymore, "then we will try to make that happen" (Tr. 80-81). Simpson admitted saying, "fine, I won't get in [Feldpausch's idea log] again. . . . I told him I would stay out of it." (Tr. 360-362.)

Explaining why he and Luttig had gone to the supervisors office, Simpson testified that before lunch, he and Luttig had agreed to make a report to Kendall, because (Tr. 360):

We just wanted to let somebody know this is what happened ["in case someone else had

seen it or someone else went and talked to management”]. *In no way was it to get [Feldpausch] in trouble* or anything like that. It was just an informational so [they would] know. [Emphasis added.]

5 After Feldpausch and Smeltzer left, Luttig and Simpson remained in the supervisors office to make their report to Kendall and Lynch. As Luttig reported to Rinard later that morning (Tr. 307):

10 We gave two supervisors a brief rendition of what happened on the floor with Marty and I and Jeff Simpson, and when we told them what had happened we said, *we are not filing a formal complaint, we are not trying to tattle on him*, nothing like that. We are just basically saying it was *hostile and aggressive*. [Emphasis added.]

15 Regarding Feldpausch’s conversation on the floor with Luttig, Simpson testified (Tr. 355):

I did tell Jamie [Kendall] that Marty Feldpausch had made the comment that he’s going to make some phone calls and that they would settle this [to]night.

20 Simpson further claimed at the trial (Tr. 350–356) that he told Kendall and Lynch about the “confrontation”; about Feldpausch “coming around the corner” and “you could tell just in his walk that he was upset” and “pissed”; that you could see that Luttig “kind of backed up because he knew something was coming”; that Feldpausch was “very loud and aggressive” and “very stern”; that “You could tell he was angry. Finger pointing”; that “you could tell that Larry was upset because . . . our rings come in racks, and Larry was basically rotating the rings and you could see his hands just shaking. That’s how upset he was”; about the “aggressive nature of how I felt the conversation looked and the aggressive nature of Marty”; and “I thought it was extremely inappropriate.”

30 I discredit Simpson’s claims of what happened in Feldpausch’s “confrontation” with Luttig. I find that he fabricated these claims to support Luttig’s claim to Kendall and Lynch that Feldpausch was “hostile and aggressive,” yet he and Simpson “are not filing a formal complaint” and “are not trying to tattle on him.” I discredit Luttig’s claim.

35 About 5 o’clock that morning, December 19, Supervisor Kendall came out to the shop and asked Feldpausch “about the conversation that took place between myself and Mr. Luttig.” As Feldpausch credibly testified (Tr. 81–82):

40 I told [Kendall] that it was a civil conversation. We weren’t yelling, screaming, or cussing, or swearing . . . and that my intentions were to get Larry to quit lying about his father-in-law, and that . . . what I meant by my statement, that I would have it resolved tonight, I explained to him that it was my intention to [call] one of my union friends . . . and have them either fax me or e-mail me a statement from Mr. Braun, stating his beliefs about a union in our shop.

45 This testimony is undisputed. Kendall did not testify.

50 Undoubtedly Kendall—who was present that night at the beginning of the December 19–20 third shift when Rinard suspended Feldpausch—relayed this conversation, confirming Feldpausch’s continuing union activity, later that morning to Plant Manager Rinard, who was scheduled to arrive between 9 and 10 o’clock (Tr. 310–311).

7. Rinard and Luttig building case for discharging Feldpausch

That morning, December 19, on the day shift, Luttig returned to the plant about 10 o'clock and asked Rinard for a meeting. Rinard said "Sure." Luttig testified that when he said it was about "a confrontation I had on the floor" with Feldpausch, Rinard asked "Would you mind if we had [Human Resources Manager Peterson and Quality Assurance Manager Larry Burke] present also?" Luttig said "Fine, bring them in." (Tr. 300-301, 434.) Thus, Peterson knew firsthand what Luttig told Rinard.

Neither Peterson nor Burke testified about the meeting.

Luttig testified he reported to Rinard and the two other managers that earlier that morning, when he was talking to Simpson, Feldpausch came around his machine and "approached me in a very aggressive way, he was pretty upset about something. . . . Marty come to me with arms extended, fingers pointing straight at me and he said, you and I have got something to straighten out today, or now, or something to that effect." (Tr. 302.)

Luttig testified he reported that later in the conversation, Feldpausch said (Tr. 304):

"[Y]ou and I will finish this alone. Just the two of us," Marty and I. He apparently wanted Jeff [Simpson] out of the conversation. I said, "No, let's settle it right here and now, tell me what is going on, tell me what the rumors are." He said, "No, I am going to make some phone calls, you and I will straighten this out tonight. I am going to make some phone calls and find out . . . what your father-in-law is saying is or isn't true. . . . we will get this straightened out tonight" and he turned and left.

Luttig also testified he reported to Rinard (Tr. 305, 307) that after lunch that morning, he and Simpson told Supervisors Kendall and Lynch in the supervisors office "what had happened" and said that

we are not filing a formal complaint, we are not trying to tattle on him, nothing like that. We are just basically saying it was hostile and aggressive. . . . we also agreed, Jeff and I did, that if approached by Marty or if we just had contact, run into him, we would not converse with him at all. We would just turn and walk away. The two supervisors [said] "Yeah, that would be appropriate." [Emphasis added.]

Luttig then added in his report to Rinard (Tr. 308):

I was still pretty upset and basically that was the end of that conversation [with Kendall and Lynch], but before I left I was still shaken up and I told [Kendall] and Jeff [Simpson], I am not sure if I was going to let this settle at this. The man was very hostile to me, more so than he ever has been in the past and he is going after my family.

He told me he is going to continue going after my family, he is going to continue this argument [to]night. . . . I am not sure what I am going to do with this, but I may take it as far as up front. I meant up front to Mr. Rick Rinard.

Luttig further testified he reported (Tr. 310) that after he finished working that morning and was deciding "what my next move wants to be," he just thought—contrary to his other testimony, discussed above (Tr. 315-317, 319-321):

[This was] the third time I have had a conversation with Marty and all three times my family members were brought up and I asked him all three times to leave my family

members out of it. Not only personally attacking me, he was going after my family. I can protect me, but my family I can't. So I decided, he has done it three times and *I am going back to report to them* [alluding to his previous "updates" to Rinard of the December 9 and 12 conversations, related to Feldpausch's organizing efforts (Tr. 313)].

5

The evidence is clear that this testimony about Luttig's family is not only obviously fabricated, but that Rinard was aware, from the Luttig's December 9 and 12 "updates" to him, that it was false.

10

Luttig next testified that when he finished his rendition of what happened early that morning on the third shift, *either Rinard or Peterson asked* (Tr. 311), "Did you feel it was *threatening and intimidating or a hostile environment* [emphasis added]?" Luttig answered, giving conflicting testimony, about not being intimidated, but being threatened:

15

I did say I really was *not intimidated* by him just because I have known Marty for so many years and how he can be. Yes, it was very hostile and it was *threatening* and a very hostile environment.

20

I felt that not only I was being *threatened*, but *my family members were*. I wasn't so much concerned about myself, but the family and that is where I believe that Marty stepped over the line by going after my family. [Emphasis added.]

25

Three days later, on Sunday, December 22, Luttig prepared and gave the Company a written statement (Tr. 311-312; GC Exh. 14 p. 4), confirming that he told Rinard that he was not intimidated, but withdrawing the claim that he and his family were threatened. He asserted instead that he and family were "harassed":

30

I stated [to Rinard, Peterson, and Burke] that I was not afraid of, nor intimidated by Marty, only because I've known Marty for many years. However, another person put in the same situation could consider it a very hostile and intimidating environment. My actual complaint was that I feel that my family and myself are being *harassed* over our views of a union coming to Dana, St. Johns. Marty Feldpausch has *harassed* me on more than one occasion. These *harassments* have included *harassing* my family members who are not even employees of Dana. Each of the last few confrontations that Marty and I have had, have become more and more hostile and aggressive and appear to be an attack addressed to both myself, and my family. [Emphasis added.]

35

40

I find that in Luttig's December 19 report to Rinard, he was clearly making fabricated accusations, in support of his antiunion campaign, to help Rinard build a case for discharging Feldpausch, the leading union organizer. I discredit Luttig's denial that it was ever his intention to get Feldpausch fired (Tr. 334). By his demeanor on the stand, Luttig impressed me as being less than candid.

45

When Rinard was questioned on direct examination at the trial on June 26, 2003—after Luttig revealed, both earlier that day at the trial and also more than 6 months earlier in his December 22 statement to the Company, that he was *not* intimidated—Rinard claimed that Luttig reported how he was intimidated, testifying (Tr. 434):

50

It was the morning of the 19th, around 10 o'clock. Larry came in and told me that he'd had another confrontation with Marty Feldpausch and that he felt that they were escalating in nature and that he had tried to handle it himself, but just felt like he could not handle it anymore and he was concerned about what could happen next.

Rinard then gave his interpretation of what Luttig reported to him that morning—about Feldpausch saying he was going to make some phone calls, you and I will *straighten this out tonight*. . . . and find out . . . what your father-in-law is saying is or isn't true. . . . we will *get this straightened out tonight* [emphasis added]" (Tr. 304). Rinard testified that Luttig instead reported (Tr. 434):

He . . . was concerned with the fact Marty had made the statement that I will make some phone calls and *we'll settle this [to]night*. [Emphasis added.]

8. Preparation of suspension document

Plant Manager Rinard testified on direct examination (Tr. 436):

Q. BY MR. CARROUTH: Now, after interviewing Mr. Luttig . . . what kind of decision did you make?

A. I made the decision, with *what I had heard, I couldn't take a chance of another confrontation*, that I stayed the whole day and waited 'til third shift came in and got Jamie [Kendall] to bring Marty up and I suspended him for the possible violation of the rules until I could further investigate the situation, but *I felt like I had to separate them*. [Emphasis added.]

To the contrary, Rinard knew from Luttig's report to him that morning, that there was no danger of another "confrontation."

As indicated above, Luttig testified that he reported to Rinard that after he and Simpson told Kendall and the other third-shift supervisor that "we are not filing a formal complaint, we are not trying to tattle" on Feldpausch, he and Simpson agreed that (Tr. 307)

if approached by Marty or if we just had contact, run into him, we would not converse with him at all. We would just turn and walk away. The two supervisors [said] "Yeah, that would be appropriate."

Moreover, Luttig testified that he reported to Rinard what Feldpausch said he was planning to do when he came in that night, after making some telephone calls. As indicated, Luttig reported (Tr. 304) that Feldpausch said, "I am going to make some phone calls. . . . and find out . . . what your father-in-law is saying is or isn't true," and further testified (Tr. 308), Feldpausch told me "he is going to continue this argument [to]night"—clearly not causing him to feel that Feldpausch was "threatening and intimidating" or creating "a hostile environment."

Thus, Luttig's testimony obviously contradicts Rinard's claim that from "what I had heard, I couldn't take a chance of another confrontation" and "I felt like I had to separate them." I discredit Rinard's claim.

Luttig revealed that after he gave his December 19 report, Rinard told Luttig he was "going to confront Marty about the conversation" at 11 o'clock that night (Tr. 323). Luttig then called Simpson at home, and he and Simpson had "numerous phone calls" that afternoon, calling "back and forth" (Tr. 363, 365–366). Previously that morning, as Luttig reported to Rinard, Simpson had given Luttig his home and cell phone numbers and said he would go in and do "whatever you want," if Luttig took this up with Rinard (Tr. 309–310).

When Simpson was asked on direct examination if anyone encouraged him to come in and report to Rinard, Simpson answered "No." But he then admitted, "It was a conversation

between Larry and I as to what we should do.” (Tr. 376.) Simpson earlier testified that “as I agreed . . . I wanted to talk to Rick [Rinard]” (Tr. 367).

5 Rinard testified (Tr. 436), “I stayed the whole day [at work] and waited ‘til third shift came in.” During that time, as the evidence indicates, Rinard had been conferring with the Company.

10 The evidence also indicates that, after previously overruling Rinard’s decision to discipline Feldpausch, to avoid evidence of discrimination against him for his union activity, as discussed above under “Background,” the Company decided this time to authorize Rinard to suspend Feldpausch and, after the formality of an investigation, to discharge Feldpausch, to rid the plant of this leading union organizer and put an end to his organizing efforts.

15 A Progressive Action Form was prepared for Rinard’s signature, dated December 19, for “Suspension—Pending investigation” of Feldpausch, stating as reason for action: “Violation of Plant Rules 16, 17, 18, 26, and 33, as well as violation of the Workplace Violence Policy in the Handbook,” and stating “An investigation will be performed.” A copy of the document was provided to Feldpausch *after* his discharge. (GC Exh. 8; Tr. 232–233.)

20 These violations of the plant rules (GC Exh. 9 pp. 55–57) include the following—but nothing specific about “creating a hostile work environment”:

25 Rule 16: improper interference with production.
Rule 17: threatening, intimidating, or coercing others.
Rule 18: disorderly, disruptive, or unruly conduct.
Rule 26: wasting time or excessive visiting.
Rule 33: overall unacceptable performance.

30 In the work violence policy in the handbook (GC Exh. 10 p. 13), the violations include: threatening another person’s family with harm.

9. The December 19 suspension

35 About 11:20 p.m. on December 19, when called to the office, Feldpausch met with Rinard and Supervisor Kendall. Feldpausch testified (Tr. 83–84):

A. When I got to the office, I sat down and I asked what was going on, and Rick Rinard spoke up and said, “Marty, I am suspending you for intimidation and creating a hostile work environment.”

Q. Did you say anything in response?

40 A. Yeah, I said, “What are you talking about? I don’t understand what you mean.”

Q. Okay.

45 A. At that point . . . [Rinard] kind of slammed the table a little bit, and he says . . . “you told Mr. Luttig that [*we’ll settle this tonight*] and that is a threat, and I won’t tolerate it in my shop. . . . You are suspended until further notice.” [Emphasis added.]

I find that the words “we’ll settle this tonight” were the words Rinard used, as Rinard interpreted Luttig’s report earlier that day (Tr. 434). I find that Feldpausch erroneously recalled that Rinard said “you told Mr. Luttig that you were going to have this situation resolved tonight.” As Feldpausch credibly testified, to have it or the situation “resolved tonight” was what he told Luttig and what he later reported to Supervisor Kendall about 5 o’clock that morning.

Both Feldpausch and Rinard testified that Rinard cited violations (or possible violations)

of the five rules and the workplace violence section in the handbook—without informing him what he may have done to violate them, except Rinard’s statement that Feldpausch threatened Luttig by telling him, “we’ll settle this tonight.” Rinard admitted he did not ask Feldpausch “for his side of the story.” (Tr. 86–89, 454).

5

After Rinard sent Kendall out to get Feldpausch’s belongings for him to leave the plant, as Feldpausch credibly testified (Tr. 84–85):

10

I said, “Rick . . . you know as well as I do that this doesn’t have anything to do with what happened out on the floor, but it has everything to do with the ideas I put in the idea log and my union activity.”

Q. Did he say anything in response to that?

A. Yes, he said, “This has nothing to do with your union activity or your idea log.

This has only to do with what happened out on the shop floor.”

15

By Feldpausch’s demeanor on the stand, he impressed me most favorably as a truthful, forthright witness, doing his best to recall accurately what had happened.

20

Feldpausch then stated that “This whole thing is just hilarious.” Rinard responded, “Well, I got a feeling it is not going to be so fun for you when it is all said and done.” Feldpausch asked, “Is that some type of threat?” Rinard answered, “No, that is not a threat.” (Tr. 85.)

25

Rinard gave the following version of the December 19 suspension—omitting any reference to the reason he stated for suspending Feldpausch: that he told Luttig “we’ll settle this tonight” and that is a “threat,” thereby intimidating Luttig and creating a hostile work environment (Tr. 436–437):

Q. And what, specifically, did you tell Mr. Feldpausch in that meeting?

30

A. I told him that he was being suspended for possible violation of Items 16, 17, 18, and I think at that time we had 26 and 33 in there, along with the potential of the workplace violence rule.

Q. Did you give him any facts to support what you meant by violating those rules, the underlying facts that would support a possible violation of those rules?

35

A. I didn’t go into a bunch of details because it was right away getting out of hand. You know, he was turning it around that I was threatening him and I just wasn’t going to get anywhere, so I just give him what he—what I was suspending him for until we could do further investigation.

Q. And, when you told him he was being suspended, did he respond in any way?

A. Yeah. He told me he was going to have fun with this one.

40

Thus, Rinard did not deny that Feldpausch said his suspension “has everything to do with the ideas I put in the idea log and my union activity.” Neither did Rinard deny that he responded, “This has nothing to do with your union activity or your idea log. This has only to do with what happened out on the shop floor.”

45

I find Rinard’s failure to deny this testimony is most significant, for three reasons.

50

First, Feldpausch’s undisputed testimony, that Rinard responded that the suspension “has nothing to do with your union activity,” demonstrates that Rinard was aware that Feldpausch’s was engaged in union activity.

Second, contrary to the Company’s later contentions, Rinard stated that the suspension

“has only to do with what happened out on the shop floor.”

Third, Feldpausch’s idea log had been brought to Rinard’s attention (Tr. 482). Yet, there is no reference to his idea log in the suspension document, which was prepared when, as
 5 Rinard testified: “I stayed the whole day and waited ‘til third shift came in”—undoubtedly conferring with the Company regarding the contents of the suspension document.

Particularly in view of the Company having previously overruled Rinard’s action against Feldpausch “to avoid evidence of discrimination against Feldpausch for his union activity,” I find
 10 that the Company decided to omit any reference to Feldpausch’s idea log for the same reason.

As found, 2 days earlier on the morning of December 17, when Feldpausch asked Supervisor Kendall why “all but a couple of my ideas were going to be rejected,” Kendall “said
 15 the following night, I should be seeing something on the board.” Then that night (on the December 17–18 third shift), a one-page notice entitled “Idea Program Guidelines” (GC Exh. 7) appeared on the main bulletin board for the first time. It stated toward the bottom of the page, “Abuse or misuse of the Idea Program will be handled on an individual basis.”

The Company evidently decided that if it were to suspend Feldpausch for his idea log,
 20 that soon after it posted the Idea Program Guidelines on the main bulletin board, the posting would appear to have been for a discriminatory purpose. As elicited on cross-examination, Feldpausch suspected that the Company’s purpose in posting the guidelines was “to try to use it against me” (Tr. 129–130).

I find that the Company had decided not to discharge Feldpausch for “abuse” of the Idea
 25 Program when authorizing Rinard to suspend and discharge him.

Remaining in the office still longer after suspending Feldpausch that night, Rinard had Jeffrey Simpson brought to the office to follow up Luttig’s report that morning. At 11:45 p.m.,
 30 Simpson agreed to have his statement recorded on an audiotape (Tr. 367–368, 376, 437).

A transcript of the tape (R. Exh. 5) demonstrates how Rinard was seeking evidence to support his suspension of Feldpausch. His questions included several leading questions:

35 Page 1: “Do you think Marty was threatening and intimidating Larry last night?”—to which Simpson answered, “Very much so. . . . a very aggressive conversation.”

Page 1: “A hostile environment?”—to which Simpson answered, “Very much so . . . Marty [said] he was going to make phone calls to certain individuals. . . . and that
 40 ‘[to]night you and I will settle this.’ And it was the finger pointing . . . toward Larry that ‘you and I will settle this [to]night.’”

Page 3: “I’m asking did Marty threaten or intimidate Larry Luttig last night?”—to which Simpson answered, “By all definition I would say yes.”

I discredit Simpson’s answers. He was obviously most willing to support the Company’s
 45 cause, regardless of the facts. He was one of the antiunion employees, willing to join Luttig’s antiunion campaign. He was then on probation for falsifying a document. As he revealed in a formal pleading that the Company prepared for his signature, as discussed below (GC Exh. 16 p. 15, par. 7):

50 In 2002 [that same year], I was disciplined by the Company for allegedly falsifying a document. As a result, I was suspended and put on probation for one year. The incident happened during the first part of 2002. I disagreed with this decision and this discipline.

10. Rinard's admitted awareness of Feldpausch's union activity

Rinard admitted being aware, before he suspended Feldpausch on December 19, that Feldpausch was engaging in what amounted to union activity.

5

Rinard testified on cross-examination (Tr. 454-456):

10

Q. . . . Now you knew, based on what Larry Luttig told you [on December 19 about his conversation earlier that morning with Feldpausch], that the conversation and the issue that was the situation between Marty and [you] involved . . . the union, correct?

A. No. Not at all. . . . Union activity, to me, is the buttons that's been discussed, handbilling, going to meetings. [The conversation] that took place, to me, has nothing to do with union activities.

15

Q. . . . but you knew that this conversation involved the union, correct?

A. If it doesn't fit my definition of union activity, I'm saying no.

20

Q. So [Luttig] explained to you that Marty had come up to him and . . . the discussion centered around the fact that . . . Larry Luttig felt like his father-in-law was being harassed because *Marty was trying to find out whether [the father-in-law] had said anything negative about the union*, isn't that true?

A. That's what he said. [Emphasis added.]

25

Thus, Rinard admitted awareness that Feldpausch was engaged in union activity, trying to find out whether Luttig's father-in-law was making negative statements about the Union, for the obvious purpose of discrediting Luttig's antiunion rumors and enabling the Union to get more cards signed.

11. Mere formality of an investigation

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Before Feldpausch's suspension on December 19, team development-impact leader Sandra Harr had already delivered to Human Resources Manager Peterson her written statement, dated December 17, which read (R. Exh. 4; Tr. 281):

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Marty Feldpausch came into my office and asked, "Now what's going on with my ideas?" I responded to him "What do you mean?" Marty replied, "If my idea aren't going to count, I want to know why. I feel these are my thoughts, genuine ideals and I feel they are 100% implementable." (With the exception of the idea he turned in regarding Jerry Kohagen physical features.)

40

. . . Marty asked me to pass the message on to [Lead Manufacturing Manager] Smania. . . . I told Marty I would. . . .

. . . Marty presented himself in a *loud, physically close, defensive manner*. [Emphasis added.]

45

Although Peterson did not mention it in her testimony, on December 23, as Smania credibly testified, he made an oral report to the plant PCL, consisting of Rinard, Peterson, and other staff, that on December 18, the day after Feldpausch's conversation with Harr, Feldpausch apologized to Harr and Smania, stating "he was sorry for how he had addressed [Harr] yesterday, that he was upset, that he didn't mean to take it out on her, and that he was sorry" (Tr. 251-253).

50

Meanwhile Luttig prepared and gave the Company his December 22 written statement,

confirming what he had reported to Rinard on the morning of December 19, before Feldpausch's suspension (GC Exh. 14; Tr. 312-313). As found, Peterson was present on December 19 when Luttig made that report to Rinard (Tr. 301).

5 Peterson's investigation consisted of her interview of Feldpausch on Monday, December 23, the day before the Company's 9-day Christmas-New Year shutdown, from December 24 to January 1 (Tr. 275).

Feldpausch credibly gave this brief testimony about the interview (Tr. 90):

10

Q. Okay. And what happened at this meeting?

A. They asked me to explain my side of it, exactly what happened out on the floor, and that is exactly what I did.

Q. What did you tell them?

15

A. I explained to them that the conversation [on December 19 with Luttig] didn't last that long. There was no violence, there were no threats . . . and that I was just trying to put a stop to the rumors that Larry [Luttig] was circulating about his father-in-law.

Q. Did Larry Burke or Barb [Peterson] say anything in response?"

20

A. Not really too much. They . . . both nodded their heads as I was speaking, and they really seemed to understand what I was talking about and sympathized with me.

Later, on rebuttal, he testified that Peterson told him in the December 23 meeting that she "was just here to gather information," that it was an "informational hearing," and that "We spent approximately 30 minutes in there and I would dare say 29 minutes of that I was talking" (Tr. 523).

25

Regarding what happened on the shop floor, Peterson testified (Tr. 467-469):

30

Basically, I told Marty that we were there to discuss the events that had occurred the other evening. . . . Basically Marty [Feldpausch] related that there were some issues between he and Larry [Luttig] in regards to some rumors that, apparently, had been floating around the plant. . . . He said that he was trying to substantiate rumors, whether they were true or untrue. . . . basically, in regards to statements that were supposedly made by Mike Braun that were derogatory toward the Union and that he had contacted several people to report those kinds of things to union officials and he was still trying to get to the bottom of the matter. . . but that Larry really did not want to discuss the situation with him or give him the answers he was looking for.

35

By this testimony, Peterson was admitting knowledge of Feldpausch's union organizing activity, endeavoring to discredit Luttig's rumors of UAW member Braun's derogatory statements about the Union, for the obvious purpose of getting more union cards signed.

40

Despite this admission, Peterson later testified (Tr. 472-473):

45

Q. BY MR. CARROUTH: At the time that you had this meeting with Mr. Feldpausch, were you aware of the union activity in the plant?

A. No.

. . . .

A. Marty made a statement in regards to that.

50

Q. And what was that statement?

A. He said that . . . there's no union activity going on right now and, if there were, I would not be a part of it.

Even if Peterson meant to deny only her awareness of any active union campaigning in the plant, as earlier that year in March and April, I discredit her claim that Feldpausch said “there was no union activity going on” and that he “would not be a part of it” if there were. She had just admitted that he had told her in the investigation about the “issues” between him and Luttig regarding [Luttig’s] rumors of Braun’s derogatory statements about the Union—obviously to discredit the rumors, to advance the Union’s organizing campaign.

After Feldpausch was recalled for rebuttal, he credibly testified that “O, no,” he never said to Peterson in a disciplinary meeting that he was “not engaged in any union activity,” and “certainly not,” he did not tell Peterson that there “was no union organizing going on” (Tr. 509).

Peterson did not testify that she made any further investigation after she interviewed Feldpausch.

Meanwhile, as Luttig testified, he called the Company during the Christmas break (from December 24 through January 1) and “I was told [Feldpausch] would not be back, whatever the date was I first reported back” (Tr. 324). Thus, Luttig confirmed that the Company had already decided to discharge Feldpausch.

I find that when the Company authorized Rinard to suspend Feldpausch, it also authorized him to discharge Feldpausch, after the mere formality of an investigation.

12. Planned January 6 discharge of Feldpausch postponed

On Monday, January 6, after returning from vacation, Feldpausch called the shop and was told the Company had been trying to contact him. He asked for a meeting, stating he wanted to present additional information. He met with Rinard, Peterson, Burke, and his witness, employee Marta McGraw. (Tr. 91, 443.)

In the meeting, Feldpausch gave the managers a fax, on UAW President Stephen P. Yokich letterhead, from district shop committeeman Sanford. The fax stated, in part, that Feldpausch had called Sanford “to see if he could contact Mike Braun to clear up [Luttig’s] rumors . . . which is why statements were made that the whole thing would be cleared up tonight meaning that through contacts between Marty and M. Braun that the truth could come out nothing more.” (Tr. 91; GC Exh. 11.)

Rinard glanced at the fax, handed it to Peterson who read it thoroughly, and she handed it to Burke, who also read it thoroughly. Then, as Feldpausch credibly testified (Tr. 92–93):

At that point—after Rick asked me if there was any additional evidence that I wanted to add, I said, no, not really, but I wanted to get a few facts straight right now.

I said, “My suspension and . . . this whole disciplinary action, where they are concerned, I need to know if they have anything to do with my ideas that I put in the idea log, or my union activity.”

All three of them agreed that they did not have anything to do with either my union activity or my ideas in the idea log.

I then reiterated again, I said, “So what you are telling me now is that they didn’t have anything to do with it.”

At that time, Barb Peterson spoke up and said, “No, Marty, this was only—” something to this effect; it might not be her exact words, she said, “This only has to do with what happened on the floor. . . . out on the shop floor . . . [the] conversation between myself and Mr. Luttig.”

After the meeting, McGraw made notes on what was said (Tr. 224). When questioned on cross-examination about her notes (Tr. 221–224), she confirmed Feldpausch’s testimony that the Company said at the meeting that the investigation did not have anything to do with either his ideas or the union drive. She credibly testified (Tr. 223–224):

5

Q. [BY MR. CARROUTH]: Now, it is your testimony today, that in the meeting on January the 6th, that Mr. Feldpausch asked if the investigation had anything to do with his ideas, or his involvement in the union drive, both of those?

A. Yes.

10

Q. And is it your testimony that the Company said, that it didn’t have anything to do with either one of those?

A. That’s correct.

The Company did not ask to see the notes.

15

When Rinard testified, as a defense witness, about this January 6 meeting on direct examination (Tr. 445–446), he was not asked any questions about Feldpausch’s credited testimony—that Rinard agreed with Peterson and Burke that neither Feldpausch’s union activity nor his idea log was involved—nor about Feldpausch’s credited testimony that Peterson spoke up and said that only his conversation with Luttig on the shop floor was involved. Neither was Rinard asked anything about McGraw’s testimony.

20

Instead, Rinard was asked if Feldpausch, or “Mr. Braun” (meaning McGraw), asked any questions. Rinard answered that “I think they wanted to know what all we were investigating?” and that Peterson responded “several different things . . . various violations of the plant rules . . . many different things, not one single thing . . . a lot of different things” (Tr. 445–446). I discredit this testimony.

25

I find that Rinard fabricated this testimony, given at the trial on June 26, 2003—months after the January 6 meeting—then knowing that by the next day, January 7, the Company had changed its position and relied on Feldpausch’s idea log and other conduct away from the shop floor as reasons for discharging him, as discussed later.

30

Moreover, as found, the Company had already decided on the discharge when it authorized Rinard to suspend Feldpausch.

35

Regarding the fax that Feldpausch brought in, Rinard testified that he thought it was irrelevant because it was signed by Sanford, not Braun (Tr. 444–445)—even though the fax confirmed that Feldpausch had called Sanford to discredit Luttig’s rumors that Braun was making statements against union representation at the plant.

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After the discussion, Rinard, Peterson, and Burke took a brief break, for them to discuss this additional information. Feldpausch and McGraw waited outside the room. As they were walking back in, after about 5 minutes, Rinard stated that McGraw would not be allowed in the meeting because “she was allowed there through the disciplinary process, but not allowed there for the final decision.” (Tr. 94.)

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Feldpausch did not agree to McGraw’s exclusion, and Peterson spoke up and said, “We can’t continue this meeting with Marta present. This meeting is effectively over.” Feldpausch asked, “So, you are going to tell me the results of your investigation by mail, then?” Peterson answered, “That will probably happen.” (Tr. 94–95.)

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Therefore, the Company's plan to discharge Feldpausch at the January 6 meeting was frustrated when the dispute arose over whether he was entitled to have his witness present.

Thus, as found, Rinard and the two other managers agreed at the January 6 meeting that neither Feldpausch's union activity nor idea log was involved, Peterson stated that only Feldpausch's conversation with Luttig on the shop floor was involved, and Rinard testified that he considered Sanford's fax to be irrelevant.

In view of this evidence and the admission in Peterson's January 7 discharge letter (GC Exh. 12 p. 2) that "we attempted to set up a meeting with you on Friday, January 3, 2003 to conclude this matter," I find that the Company had planned to discharge Feldpausch at the January 6 meeting, based on Luttig's and Simpson's fabricated testimony about Feldpausch's conversation with Luttig on the shop floor.

13. Appeal to Muskegon office and shifting reasons for discharge

After the January 6 meeting, Feldpausch telephoned Mark Stewart, the director of human resources at the Muskegon office of Dana Perfect Circle, Dana Corporation. Stewart had "responsibility for overseeing human resources programs and practices for our various plants, including St. Johns, Michigan." (Tr. 236-237, 508.)

As Feldpausch credibly testified, he called Stewart because of his concern that he would be terminated because of his union activity (Tr. 508-509).

Stewart testified (Tr. 236) that Feldpausch presumably called "to appeal to my position" in Muskegon and that the conversation lasted maybe 10 or 15 minutes. Stewart then revealed why he was called to testify: to corroborate Human Resources Manager Peterson's testimony. Stewart testified:

Relatively early in the discussion [Feldpausch] brought up the issue of the union campaign in the plant and his statement to me was that it had fizzled out and there was nothing going on and he didn't personally support it.

Stewart also testified (Tr. 236-237) that he was already "aware of the suspension of [Feldpausch] for various infractions of company rules." Thus, this indicates that Peterson had been discussing Feldpausch's suspension with Stewart, her superior in Muskegon.

Undoubtedly, Peterson had reported to Stewart not only Feldpausch's union fax earlier that day, but also what Feldpausch said in her December 23 interview of him, describing how Feldpausch was engaged in union organizing activity, endeavoring to discredit Luttig's antiunion rumors, obviously to get more union cards signed.

Moreover, Feldpausch credibly testified on rebuttal (Tr. 508):

Q. [BY MS. SCHULZ]: And did you ever tell Mark Stewart that there was no union drive, apparently, going on?

A. Oh, no. no. There would be no reason for me to tell him that. In fact, I made it emphatically clear that the reason I am calling [him] is that . . . I got suspended and that I will eventually be terminated because of my union activity.

Therefore, I discredit Stewart's claim that Feldpausch told him there was no union activity going on and that he did not support the Union.

By the next day, January 7, the Company shifted its reasons for discharging Feldpausch. Evidently the Company—upon learning that Feldpausch had produced the fax in the January 6 meeting, confirming his continuing union activity—decided again to overrule a decision that Rinard made (to proceed with the discharge as planned) and decided it was advisable to assert further reasons for discharging Feldpausch, including his so-called “mocking and abuse” of the Idea Program.

I note that when Rinard was asked on direct examination “who made the decision to discharge Mr. Feldpausch?” he answered, “I guess me” (Tr. 449).

C. January 7 Discharge for Shifting Reasons

On Tuesday morning, January 7, Feldpausch called the shop, stated he wanted to get this over with, and asked for a meeting. The meeting was scheduled for 11 a.m. As shown in italics in the discharge letter, quoted below (GC Exh. 12, paragraph 9), “The matter . . . was not concluded until today,” clearly referring to the Company’s shifting its reasons for discharging Feldpausch. The meeting was with Rinard, Peterson, and Burke. (Tr. 95.)

In the meeting, Peterson read Feldpausch the long, 11-paragraph discharge letter, dated January 7 and signed by Peterson (GC Exh. 12; Tr. 95–96).

The January 7 discharge letter cites, in paragraph 8, Feldpausch’s so-called “mocking and abuse of the Idea System” as a reason for the discharge—even though, as found, (a) the Company had decided before the suspension not to discharge Feldpausch for “abuse” of the Idea Program, (b) Plant Manager Rinard had assured Feldpausch on December 19 and again on January 6 that his idea log was not involved, (c) the Idea Program is merely a voluntary program, not a condition of employment, (d) no employees had ever been suspended or terminated for their ideas in the Idea Program, and (e) the Company states in its brief that it “was not objecting to Feldpausch criticizing the Company or plant management.”

The discharge letter omits any reference to Rinard’s stated reason for suspending Feldpausch on December 19—that Feldpausch told Luttig that morning that “we’ll settle this tonight” and that is a “threat,” which “I won’t tolerate it in my shop.”

The discharge letter states in paragraph 5 that “We have also interviewed a number of people and have *taken appropriate statements* [emphasis added].” Yet, the evidence shows that the Company had only three statements in writing.

The first statement, dated December 17 (R. Exh. 4), is Harr’s written statement, which reports that Feldpausch went to her office and defended the ideas in his idea log, except his idea “regarding Jerry Kohagen physical features.” In the last line of the statement, Harr concluded only that “Marty presented himself in a loud, physically close, defensive manner”—nothing about Feldpausch being aggressive, hostile, or intimidating.

The second (R. Exh. 5 pp. 1, 3) is the transcript of Simpson’s recorded statement, given to Rinard a few minutes after Rinard suspended Feldpausch on December 19. In the interview, Simpson readily agreed with Rinard’s suggestions, made in asking him leading questions. Simpson answered “Very much so” to the question whether “Marty was threatening and intimidating Larry [Luttig] last night,” and that “It was . . . a very aggressive conversation.” To the question, “A hostile environment?” Simpson again answered, “Very much so.” Then when Rinard repeated, “I’m asking did Marty threaten or intimidate Larry Luttig last night?” Simpson answered, “By all definition I would say yes.” As found, these answers are discredited.

The third (GC Exh. 14) is Luttig's December 22 statement, repeating clearly fabricated accusations against Feldpausch in his December 19 report to Rinard, to help the Company build a case for discharging Feldpausch.

As purported—but not explained—reasons for discharging Feldpausch, paragraph 8 of the discharge letter refers to:

(1) Feldpausch's "behavior towards other employees"—perhaps referring to his complaint to Harr in her office on December 17 (R. Exh. 4), although he apologized the next day to Harr and Smania for how he addressed her when he was upset about his ideas not being counted (Tr. 251–252), and to his complaint in the supervisors office on the morning of January 19 that Simpson, who was no longer his team leader, was looking at his Idea List and circulating his ideas around the shop.

(2) The "perception of other employees concerning your behavior"—perhaps referring to employees Lorraine Weber's and Kevin Bradley's pre-suspension criticism of Feldpausch's idea log and attitude (Tr. 414–421, 422–426).

(3) Feldpausch's "disruptive behavior in other work stations"—perhaps referring to his civil conversation with Luttig at Simpson's work station and to Harr in her office, because there was no actual "disruptive behavior" in the shop.

(4) Feldpausch's "creating a hostile environment"—perhaps referring to Luttig's and Simpson's discredited accusations.

Regarding the Company's determination in paragraph 8 of the discharge letter that Feldpausch violated the workplace violence section of the handbook (against threatening another person's family with harm), the Company was referring to Luttig's fabricated report to Rinard on December 19 that Feldpausch was "[n]ot only personally attacking me, he was going after my family. I can protect me, but my family I can't."

The January 7 discharge letter, signed by Peterson, reads (GC Exh. 12):

[Paragraph 1] It as our desire to provide you with this letter so that there is no misunderstanding of our position concerning the matters described below.

[Par. 2] On December 19th you were suspended for possible violation of several plant rules and the Workplace Violence section of the Handbook following a *chain of events* [emphasis added—without any reference to "we'll settle this tonight" being a "threat"] that occurred on the evening of December 18th [morning of December 19]. You were told that we would be conducting a complete investigation of those events.

[Par. 3] Prior to the events of December 18th and 19th the Plant Operating Committee was investigating your use and possible abuse of the Idea System. The Idea System is a corporate objective for continuous improvement in Dana facilities and is a company system used here at the St. Johns Plant. It is an essential element of Dana's corporate culture.

[Par. 4] It appeared that some of the ideas put in the system were *disparaging and debasing other employees* [emphasis added—although no employees were named in Feldpausch's idea log]. Before we could even complete that investigation the events of December 18th [on the December 18–19 third shift] occurred. Those events gave precedent to the investigation involving the possible violations due to concerns for *protecting the work environment and safety of our employees* [emphasis added].

[Par. 5] A thorough investigation has been conducted. During that investigation we have considered all that you had to say on December 23, 2002. We have also interviewed a number of people and have *taken appropriate statements* [emphasis added]. We have carefully reviewed all of the information we have gathered. I would

emphasize that we have spent a good deal of time on the investigation as we do not take these matters lightly.

[Par. 6] On January 6th, 2003 you informed me by telephone that you had additional evidence which you wanted to produce. We provided you the opportunity to produce that evidence to us in a meeting at the plant on the afternoon of January 6, 2003, with your witness, Marta McGraw present. We have reviewed the additional evidence and do not find that it materially changes the substance of the investigation.

[Par. 7] After full consideration of the investigation, we have determined that while the evidence did not suggest a violation of each and every rule or policy initially cited to you, that violation of several rules did, in fact, occur.

[Par. 8] We did find sufficient cause to determine that Plant Rules 16 [improper interference with production], 17 [threatening, intimidating, or coercing others], and 18 [disorderly, disruptive, or unruly conduct] were violated [omitting Rule 26 for wasting time or excessive visiting and Rule 33 for overall unacceptable performance], as well as the Workplace Violence section of the Handbook. This was due to the nature of your *behavior towards other employees, the perception of other employees concerning your behavior, disruptive behavior in other work stations, creating a hostile environment*, as well as the *mocking and abuse of the Idea System and disparagement of other employees* [although no employees were named] *in its use* [emphasis added].

[Par. 9] The investigation process, while seeming to be somewhat lengthy, could not be rushed and demanded careful consideration of all the facts and circumstances. Mitigating our scheduling was the plant shutdown which occurred in the middle of this whole process. In addition, we attempted to *set up a meeting with you on Friday, January 3rd, 2003 to conclude this matter* [emphasis added], but you were unable to attend. Therefore another meeting time was set up for January 6th, 2003 at which time we attempted to conclude this matter. *The matter, however, was not concluded until today* [emphasis added].

[Par. 10] We have considered the fact that multiple rules and/or policies have been violated. In addition, we have considered the impact of your conduct on other employees in the workplace in general. This review has occurred within the context of your actions in *entering nonsensical items into the Idea Program, some which were debasing and demeaning to coworkers* [emphasis added—although, as indicated, no employees were named in Feldpausch's idea log]. In view of these factors, it has been determined that your employment with Dana is terminated effectively immediately, January 7, 2003.

[Par. 11] If you have any personal items in a work station or your locker, please let us know what these items are so that we can make sure they are retrieved and sent you.

Peterson then gave Feldpausch a copy of the letter, discharging him (Tr. 96).

Thus, the Company discharged Feldpausch for obviously shifting reason. I find this discharge, without any mention of his efforts to discredit Luttig's rumors, was pretextual.

In the January 7 meeting, after being discharged, as Feldpausch credibly testified (Tr. 97, also Tr. 152-155):

I said, "Guys, what will happen if Mr. Luttig takes back everything that he said about his father-in-law and about me, what is going to happen to my employment status then? Will I get my job back?"

Q. BY MS. SCHULZ: Did anybody respond?

A. . . . I believe one of them said, "I guess we will have to cross that bridge when

we come to it," or something like that.

Q. And why did you ask that question?

A. . . . Patty [UAW Organizer Pat Manzo] and I had discussed possibly having Mitch [Sanford, who sent the fax that Feldpausch presented to the Company the day before] come to one of our meetings, and since. . . the first meeting [referring to the union meeting scheduled for December 22] had already taken place, and a series of meetings for the future were already scheduled, I figured that we could get Mike Braun [Luttig's father-in-law] to possibly come to one of the meetings, and straighten out all of these rumors.

Although there was obviously nothing threatening about Feldpausch's inquiry, Rinard called Luttig at home, awakening him. As Luttig testified, Rinard stated that Feldpausch had been terminated and before he left, he asked "what would happen to me or my job if Larry Luttig were to come back and change his story or just take his whole story back . . . would I get my job back?" (Tr. 324-325.)

Then, as Luttig further testified, Rinard told me "they took it that it could possibly be a threat because why in the world would I change my story unless somebody is putting pressure on me?" (without suggesting how). Luttig said he responded, "*I don't know if it is something of a threat* [emphasis added], or what, it sounds to me like it very well could be a threat." (Tr. 325.)

Rinard was obviously seeking a pretext for not reinstating Feldpausch, if the discharge were found to be unlawful.

D. Feldpausch's Audiotapes of Meetings Revealed

As the 2-day trial on June 25-26, 2003 progressed, there were two serious obstacles to the Company's plans for proving its defenses in the January 7 discharge letter.

The first obstacle was on the first day of the trial when, as found, the evidence reveals that Plant Manager Rinard told Feldpausch that "you told Mr. Luttig that we'll settle this tonight and that is a threat, and I won't tolerate it in my shop. . . . You are suspended until further notice," and also told Feldpausch, "This has nothing to do with your . . . idea log" and "This has only to do with what happened out on the shop floor."

Later on the first day of the trial, Feldpausch testified that in a meeting on January 6, the day before the Company asserted additional reasons for his discharge, Rinard, Human Resources Manager Peterson, and Quality Assurance Manager Burke all agreed that the disciplinary action "did not have anything to do with . . . [his] ideas in the idea log," and Peterson told him that it only had to do with what happened on the shop floor in his conversation with Luttig.

This contradicted much of the evidence the Company had planned to introduce with its defense witnesses.

The second obstacle was on the second day of the trial, when the Company presented its defenses. Employee Kevin Bradley, one of the Company's subpoenaed witnesses who testified before "Rick" Rinard did at the trial, testified that Feldpausch had shown him a copy of Feldpausch's idea log, that he had warned Feldpausch that "this is never going to fly," and that Feldpausch stated that Rinard "couldn't touch him because *he had several tapes . . . audiotapes, of previous meetings with Rick* [emphasis added]" (Tr. 423).

Bradley further testified that “I’m not prepared for this because I was just subpoenaed yesterday [the first day of trial],” and “I told the lawyer yesterday, I says, [Feldpausch’s idea] that really stood out in my mind was about Gerry Kohagen [the joke about Feldpausch’s lifelong friend getting “uglier” every year]” (Tr. 424–425).

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Thus, the Company was put on notice, at least before Rinard testified—if not when the Company subpoenaed him on the first day of the trial, before any defense witnesses testified—that Feldpausch had audiotapes of meetings with Rinard.

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There is no explanation for Rinard not disputing the evidence about what he told Feldpausch in the suspension meeting on December 19 and what he and Peterson assured Feldpausch in the meeting on January 6, other than his knowledge that Feldpausch may have audiotapes that could be used to disprove any denials that he might make.

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Near the end of the trial, after being called as a rebuttal witness, Feldpausch credibly testified on cross-examination (Tr. 525):

Q. [BY MR. CARROUTH]: And . . . did you prepare any type of statement or summary?

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A. I believe it was shortly after I talked to Patty Manzo. She told me she wanted me to review all my tape recordings. See, *I taped recorded most every conversation that I had with these people*. And she said that I probably won’t be able to use them in court, but . . . go through them, review them, and use them for your notes. . . . it was actually after I got terminated. . . . approximately January 8th. [Emphasis added.]

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The Company did not request to review the audiotapes.

E. Defenses to Shifting Reasons at Time of Discharge

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1. “No knowledge” of union activity

The Company’s contends in its brief (at 3, also at 19–22) that it “had no knowledge that Feldpausch was engaging in any union activity during the time leading up to his suspension and termination.”

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To the contrary, as found, although there was no active organizing campaign in the plant at the time, before Feldpausch’s suspension on December 19, Plant Manager Rinard was fully aware that Feldpausch was engaged in union activity, by attempting to discredit Luttig’s rumors about his father-in-law’s antiunion statements, for the obvious purpose of enabling the Union to get more cards signed.

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In fact, as found, Rinard admitted being aware that Feldpausch was engaging in what amounted to union activity, based on what Luttig reported to him on December 19, confirming that Feldpausch’s discussion with Luttig in the shop earlier that morning centered around Feldpausch’s efforts to discredit Luttig’s rumors that his father-in-law was making negative statements about the Union.

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Rinard’s testimony—that the conversation had “nothing to do with union activities,” because “Union activity, to me is the buttons that’s being discussed, handbilling, going to meetings”—is not credible.

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2. "Abuse and Misuse" of the Idea System

As its first listed defense in its brief (at 6) for discharging Feldpausch, the Company cites "1. Feldpausch's Abuse and Misuse of the Idea System."

In doing so, the Company ignores Feldpausch's credited, undenied testimony that on December 19, when Plant Manager Rinard suspended him, Rinard assured him that "This [suspension] has nothing to do with your . . . idea log."

The Company also ignores Feldpausch's credited, undenied testimony that on January 6, the day before his discharge, Rinard agreed with Peterson and Burke that the disciplinary action "did not have anything to do with . . . [his] ideas in the idea log."

Moreover, there is no reference to Feldpausch's idea log in the suspension document. As found, the evidence indicates that the Company had no intention to discharge Feldpausch for "abuse" of the Idea Program at the time the suspension document was prepared.

Thus, on the night shift of December 17-18 (before Feldpausch's suspension on the December 19-20 night shift), the Company had posted on the main bulletin board, for the first time, the Idea Program Guidelines, which provided that "Abuse or misuse of the Idea Program will be handled on an individual basis."

As found, the Company undoubtedly decided that if it were to suspend Feldpausch for his idea log—that soon after it posted the Idea Program Guidelines—the posting would appear to have been for a discriminatory purpose. As elicited on cross-examination, Feldpausch suspected that the Company's purpose in posting the guidelines was "to try to use it against me."

I find that the Company's belated claim on January 7 that it was relying on Feldpausch's idea log as a reason for discharging him is a clear pretext.

3. "Misconduct directed at Larry Luttig"

a. Relevant circumstances

As its second listed defense in its brief (at 8) for discharging Feldpausch, the Company cites "2. Feldpausch's Misconduct Directed at Larry Luttig."

The relevant circumstances, as found in detail above, are as follows.

In early December, Feldpausch met with five other employees and decided to reactivate the UAW organizing campaign, which had begun earlier that year in March. At the time, Feldpausch believed "our biggest hurdle" in reactivating the campaign was to control the false rumors that quality technician Larry Luttig was circulating in the shop, that his father-in-law (Merle Braun, a UAW member who is a well-respected community leader where many of the employees live) is against a union at the plant.

On December 9, Feldpausch had a friendly private conversation with Luttig in his lab and asked "Could you tell me your father-in-law's position on a union in our shop?" and about Mike Braun's real first name. After the meeting with Luttig, Feldpausch contacted Sanford, a UAW member who served as district shop committeeman for his local in Flint, Michigan, and UAW Organizer Manzo and told them he wanted a fax or e-mail from Braun, or to arrange for Braun to

come to a union meeting in person, to discredit what Luttig was saying about Braun.

Later that week, Luttig's wife told him that Braun had been "called into a meeting to defend himself about a complaint that the Union had received from a Marty Feldpausch in the Dana Corporation, saying that Mike Braun was cutting down the Union."

The second conversation was on December 12, when Luttig asked Feldpausch to speak to him in private, in Luttig's office. A few minutes later Feldpausch went to Luttig's office, where Luttig complained about Feldpausch stabbing him in the back by getting Braun's first name "to get at my father-in-law." Feldpausch apologized a total of four times, stating it was never his intention to get Braun in trouble. There is no indication in their testimony that either of them was acting improperly or hostilely in this private conversation.

Meanwhile Luttig, in support of his antiunion campaign, was giving Plant Manager Rinard "updates" on what was happening in the December 9 and 12 conversations, related to Feldpausch's efforts to discredit Luttig's antiunion rumors, for the obvious purpose of getting more union cards signed in the organizing campaign.

Feldpausch's December 19 conversation with Luttig—at employee Simpson's work station in the early morning on the December 18–19 third shift—was their only conversation on the shop floor about Luttig's rumors. It was overheard by only one employee, Simpson. The conversation concluded when Feldpausch said, "Look, Larry, if there is one thing I have learned, after twenty years of working here, it is this: The best form of rumor control is the truth." He then said, "I have some phone calls to make" and "I will have this situation resolved when I get in to work tonight."

About 10 o'clock that morning, December 19, Luttig returned to the plant and reported to Rinard that Feldpausch told him in the conversation:

I am going to make some phone calls, you and I will straighten this out tonight. I am going to make some phone calls and find out . . . what your father-in-law is saying is or isn't true. . . . we will get this straightened out tonight.

Rinard misconstrued this and gave his own interpretation of Luttig's report. Instead of acknowledging that Luttig reported that Feldpausch said, "I am going to make some phone calls, you and I will straighten this out tonight" and that he would find out "what your father-in-law is saying is or isn't true," Rinard claimed that Luttig reported that Feldpausch stated:

I will make some phone calls and *we'll settle this [to]night*. [Emphasis added.]

After Luttig completed his report, in which as found, Luttig "was clearly making fabricated accusations, in support of his antiunion campaign, to help Rinard build a case for discharging Feldpausch, the leading union organizer," Rinard claimed as follows:

Q. BY MR. CARROUTH: Now, after interviewing Mr. Luttig . . . what kind of decision did you make?

A. I made the decision, with what I had heard, I couldn't take a chance of another confrontation, that I stayed the whole day and waited 'til third shift came in and got Jamie [Kendall] to bring Marty up and I suspended him for the possible violation of the rules until I could further investigate the situation, but I felt like I had to separate them.

To the contrary, as found, Rinard realized from Luttig's report to him that morning that

neither Luttig nor Simpson construed what Feldpausch said to be a threat. Luttig revealed in his report to Rinard that after Feldpausch's conversation with him early that morning, Luttig and Simpson told Supervisors Kendall and Lynch in the supervisors office that "we are not filing a formal complaint" against Feldpausch and "we are not trying to tattle on him, nothing like that."

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As indicated, I discredit Rinard's claim that "from what I had heard, I couldn't take a chance of another confrontation" and "I had to separate them."

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I also reject the Company's clearly unfounded contention in paragraph 4 of its January 7 discharge letter (GC Exh. 12) that the events on the morning of December [19] caused concerns for "protecting the . . . safety [emphasis added] of our employees."

b. When case arose

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The evidence clearly shows that this case arose when Plant Manager Rinard suspended Feldpausch that night, December 19, after Rinard stayed at the office the whole day and, as found, received the Company's authorization to suspend Feldpausch and to discharge him after the formality of an investigation.

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About 11:20 p.m. that night, after calling Feldpausch to the office, Rinard said, "Marty, I am suspending you for intimidation and creating a hostile work environment." When Feldpausch asked, "What are you talking about? I don't understand what you mean," Rinard responded:

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You told Mr. Luttig that we'll settle this tonight and that is a threat, and I won't tolerate it in my shop. . . . You are suspended until further notice.

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On January 7, after going through the formality of an investigation, the Company shifted its reasons for the discharge and gave Feldpausch a long, 11-paragraph discharge letter, omitting any reference to this purported threat.

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Previously, soon after the latest union organizing drive began at this St. Johns plant in March 2002, as found, Feldpausch told Rinard, over a disputed discipline, "I will jump on the UAW bandwagon, and I will support it with everything I have." Rinard's response was, in effect, "You do what you have to do, and I will do what I have to do."

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During Feldpausch's active campaigning for the Union, three of the supervisors told him they felt the Union would cause the plant to lose customers and to shut down. When he asked one of them "what have you been programmed to tell us concerning the union," the supervisor replied, "Well they can't really tell us what to say, but my own personal opinions are that it is going to cost more to make the ring, and my fear is that eventually our shop will have to shut down, because we will lost contracts to other nonunion shops."

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Later, about August or September, after Rinard told Feldpausch that Kendall's disciplinary coaching session on Feldpausch's record "would stand," Feldpausch told Rinard that he was tired of Kendall and Manufacturing Manager Fandel harassing him because of his union involvement and that if need be, he would go over Rinard's head and speak with his boss in Muskegon.

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About 3 days later, Rinard told Feldpausch he had instructed Kendall to erase the discipline from Feldpausch's record. As found, the Company had overruled Rinard's decision to uphold the coaching session, to avoid evidence of discrimination. After several previous unsuccessful union drives at the St. Johns plant, the Company was understandably cautious

about permitting conduct that could appear discriminatory against a leading union organizer.

Then, on the day of Feldpausch's suspension, as found, the Company decided to omit any reference to Feldpausch idea log in the suspension document, for the same reason.

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Later, on January 6, after Feldpausch produced a fax on union stationery confirming his union activity, the Company overruled another decision by Rinard—this time his decision to ignore the fax and to proceed with the discharge based on Luttig's and Simpson's fabricated claims against Feldpausch—and decided it was advisable to assert additional reasons for discharging Feldpausch, including his so-called "mocking and abuse" of the Idea Program.

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Under all the circumstances, including the Company's shifting reasons for the discharge, I find that because of Feldpausch's continuing union activity, the Company, as a pretext, seized on Rinard's false claim that Feldpausch had threatened Luttig—by telling him "we'll settle this tonight"—and authorized Rinard to suspend Feldpausch and to discharge him after the formality of an investigation, to rid the plant of this leading union organizer and stop his organizing efforts.

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4. Defenses based on fabricated and misrepresented evidence

In its brief, the Company completely ignores Rinard's telling Feldpausch on December 19 that he told Luttig that morning that "we'll settle this tonight," that is a "threat," that "I won't tolerate it in my shop," and "You are suspended until further notice."

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Instead, the Company's brief relies on its version of Luttig's and Simpson's fabricated and discredited accusations, to paint an unwarranted picture of Feldpausch's conduct.

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In doing so, the brief ignores two facts. One, Feldpausch's "confrontations" on the early morning of December 19, before his suspension that night, took place in only two places: with Luttig at Simpson's workplace, outside the hearing of any other employee, and in the supervisors office, involving only one employee, Simpson. Therefore, his conduct did not create a "hostile work environment."

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Two, Feldpausch's only other "confrontation" was 2 days before his suspension, in the office of employee Sue Harr. The following day Feldpausch apologized to Harr and Smania, stating "he was sorry for how he had addressed [Harr] yesterday, that he was upset, that he didn't mean to take it out on her, and that he was sorry." This, of course, did not create a "hostile work environment."

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Feldpausch's only conduct affecting Luttig's family was after his private meeting with Luttig on December 9, when he called district shop committeeman Sanford and UAW Organizer Manzo to request that they get a fax or e-mail from Braun, or arrange for him to come to a union meeting, to discredit what Luttig was saying about him. All the accusations that Feldpausch harassed, intimidated, threatened, or was going after Luttig's family are discredited fabrications.

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The Company contends in its brief and accuses Feldpausch as follows:

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Page 2, that Feldpausch was terminated for "creating an hostile environment."

Page 9, that Feldpausch was gathering information about Luttig's father-in-law to carry out his plan of "harassing and intimidating Luttig and his family," that he was "harassing and threatening Luttig by going after his family," that "Feldpausch confronted Luttig at work in a threatening and intimidating manner," and that he "approached Luttig in a very hostile and aggressive manner."

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Page 10, that “Feldpausch was very aggressive and confrontational,” that he was “acting in an angry, hostile manner,” that his actions were “inappropriate, threatening, and hostile,” that Luttig “perceived Feldpausch’s actions as a threat,” that Feldpausch “told [Luttig] he is going to continue going after [his] family,” that he was “Not only personally attacking” Luttig, but “he was going after [Luttig’s] family,” and that Luttig’s “confrontations” with Feldpausch had “escalated to the point where [Luttig] could not handle it himself anymore.”

Page 11, that “Feldpausch confronted Simpson in a loud and aggressive manner” and that Simpson “felt Feldpausch’s actions were hostile and very intimidating.” This accusation clearly misrepresents Simpson’s testimony (Tr. 357–358) as well as his statement on the transcript of the audiotape (R. Exh. 5 par. 1) of his December 19 interview by Rinard. It referred to Feldpausch’s first so-called “confrontation” with Simpson, at Simpson’s work station before Feldpausch returned and “confronted” Luttig. There is no indication in Simpson’s testimony or in his statement on the transcript that Feldpausch confronted him in “a loud and aggressive manner, or that he “felt Feldpausch’s actions were hostile and very intimidating” toward him.

Page 11, that Feldpausch also “confronted Simpson in a very hostile and threatening manner” and was “threatening Simpson.” This accusation clearly misrepresents Simpson’s testimony (Tr. 360–362), regarding his second “confrontation” with Feldpausch in the supervisors office, where Simpson admittedly told Feldpausch, “fine, I won’t get in [Feldpausch’s idea log] again. . . . I told him I would stay out of it.”

Page 12, that Feldpausch’s “confrontation of Simpson was just another attempt by Feldpausch to create a hostile working environment” and was “offensive . . . hostile and threatening,” which clearly are further misrepresentations, and that “Feldpausch aggressively and inappropriately confronted Sue Harr,” was “very loud and aggressive,” and was “overall very intimidating” (bases on her claims at the trial, Tr. 280, 286–292), which clearly contradict her December 17 written statement (R. Exh. 4) that “Marty presented himself in a loud, physically close, defensive manner.”

Page 18, “Feldpausch engaged in physically aggressive and intimidating conduct in the workplace” and “creating a hostile work environment at the plant,” which are repetitions of such fabrications.

Page 39, that Luttig “was consistently harassed and threatened by Feldpausch at work,” that Luttig testified about the “escalating nature of Feldpausch’s confrontations with him on the floor,” that Luttig believed “Feldpausch was harassing his father-in-law,” that Feldpausch’s confrontation “was very hostile and it was threatening and a very hostile environment,” and that Luttig and Simpson decided to report Feldpausch’s conduct to management “because it was very hostile, very aggressive.”

Page 40, that Feldpausch was “Not only personally attacking” Luttig, but “he was going after [Luttig’s] family,” that “he created a hostile work environment,” and that “Feldpausch’s actions were threatening, very hostile and very intimidating.”

Page 41, that Feldpausch’s conversation with Luttig “was a very hostile and aggressive conversation.”

The Company contends in its brief (at 2) that the General Counsel is “attempting to focus the case on what Feldpausch contends was an *innocent effort to gather information* [emphasis added]” to “confirm whether a coworker’s father-in-law, who was a member of the [Union], made statements that allegedly disparaged the [UAW].” This contention, I find, reveals the Company’s accurate assessment of what the evidence shows actually happened.

I find that it is the Company—through the multiple repetitions of unfounded defenses in its brief—is “attempting to focus the case” away from Rinard’s false statement that Feldpausch threatened Luttig by telling him “we’ll settle this tonight.” As found, the Company seized on this

false claim as a pretext and authorized Rinard to suspend and discharge Feldpausch after the formality of an investigation, to rid the plant of this leading union organizer and stop his organizing efforts.

5 F. Additional Defenses After Feldpausch's January 7 Discharge

1. March 3, 2003 position statement and attachments

10 On March 3, 2003, after the charge was filed on February 3, 2003, and after the Union's reactivated organizing union drive failed after Feldpausch's January 7 discharge (GC Exh. 16 p. 12, par. 27), the Company filed its position statement, entitled "Response to Request for Information" (GC Exh. 16 pp. 1-7).

15 The position statement asserts, "I am sure your investigation will establish that Feldpausch engaged in physically aggressive and intimidating conduct in the workplace [omitting any reference to creating a hostile work environment] and engaged in conduct outside of the workplace that involved threatening family members of a coworker" (GC Exh. 16 p. 3)—without making any reference to Feldpausch's purported "mocking and abuse of the Idea System."

20 The Company also makes no direct reference in the position statement to a defense that Feldpausch used the Company's machining equipment during regular work time to do personal work. Instead, the Company includes this defense in an attached document (GC Exh. 16 pp. 8-13), dated March 3, 2003 and signed by employee Gary Smeltzer, accusing Feldpausch of this and other purported misconduct not cited in the reasons for discharging him in the Company's
25 January 7 discharge letter.

30 That March 3, 2003 document signed by Smeltzer, and also attached documents signed by employees Jeffrey Simpson and Larry Luttig, likewise dated March 3, 2003 (GC Exh. 16 pp. 14-19, 20-23), are formal pleadings, prepared by the Company and filed in defense of the charge with "UNITED STATES OF AMERICA BEFORE THE NATIONAL RELATIONS BOARD REGION 7," in the matter of "DANA CORPORATION" and "UAW INTERNATIONAL UNION, CASE 7-CA-45969-1."

35 As prepared by the Company, all three formal pleadings include a statement that under the plant rules, employees can be discharged for creating a hostile work environment—one of the stated reasons for discharging Feldpausch—although there is nothing specific in the plant rules about creating a hostile work environment (GC Exh. 9 pp. 55-57).

40 The Company attached to the formal pleading signed by Luttig, the statement Luttig prepared and presented to the Company on Sunday, December 22 (GC Exhs. 14 and 16 pp. 24-27).

45 The Company did not attach to the formal pleading signed by Simpson, the transcript (R. Exh. 5) of the audiotape of his interview by Rinard on December 19, a few minutes after Rinard suspended Feldpausch. As found, that transcript shows that Simpson agreed with suggestions made in Rinard's leading questions, testifying that he thought "Marty was threatening and intimidating Larry last night," that Feldpausch created a "hostile environment," and that "By all definition," he would say that Feldpausch did "threaten or intimidate Larry Luttig last night."

50 The company-prepared formal pleading that Simpson signed omits the references to Rinard's leading questions.

Paragraph 11 of this formal pleading signed by Simpson (GC Exh. 16 pp. 15–16) is based on the third paragraph of the audiotape transcript of Simpson’s December 19 interview by Rinard (R. Exh. 5 p. 1). That third paragraph concerns Feldpausch’s approaching Simpson at Simpson’s work station (before Feldpausch returned later and “confronted” Luttig) and asking Simpson “who a woman named Pat was.” It contains nothing about Feldpausch confronting Simpson “in a very loud and aggressive manner,” or about Feldpausch being “demanding” or “intimidating and hostile.”

In preparing this formal pleading, however, the Company worded paragraph 11 to state (GC Exh. 16 pp. 15–16):

11. Early on 3rd shift on December 18, Marty *confronted* me and started asking me a number of questions *in a very loud and aggressive manner*. Marty was *demanding* that I tell him who a woman named Pat was. . . . During this *confrontation*, he was *aggressive* and *was raising his voice*. I considered the way in which Marty approached me to be *intimidating and hostile*. [Emphasis added.]

I find it obvious that the Company inserted these fabrications to support a defense that Feldpausch intimidated and was hostile to Simpson, as well as Luttig. I reject this belated defense as a pretext.

2. Accusations in attached formal pleading signed by Smeltzer

a. Smeltzer’s motivation

The evidence does not reveal why or when Smeltzer turned against the Union. As found, he was one of the employees who met with Feldpausch in early December when they decided to reactivate the union campaign.

Smeltzer had been working about 5 years, but was still working as an apprentice because his first apprenticeship has been taken away in February 2001 as a result of the Company’s outsourcing—causing him to be “quite upset.” He testified that he put in “two or three or four” sarcastic ideas (in the Idea Program), including one stating “why don’t we just outsource the whole damn tool crib to Olympian Tool,” and that “my coach pulled me in and he coached me on the ideas.” (Tr. 393–394, 411–412.)

He testified that he was “quite upset” again over the Company’s taking away the 75-cent extra pay for the time he was going to spend on team leadership responsibilities and wrote a formal resignation letter resigning his team leadership duties. But then “I just, basically, come to my senses and thought it was pretty selfish of me to, basically, drop my responsibilities and leave my team hanging like that” (Tr. 391).

At the trial, Smeltzer gave conflicting testimony.

For example, Smeltzer insisted, “I did not want to see Marty [Feldpausch] lose his job” (Tr. 401), “I didn’t want to see Marty get fired, lose his job” (Tr. 403), and “I didn’t want to see him get fired” (Tr. 405). Yet he earlier testified, “I volunteered my information because I thought it was the right thing to do” (Tr. 397–398).

Obviously Smeltzer, like Simpson, was then one of the antiunion employees. Clearly his motivation for “volunteering my information” was to support the Company’s decision to discharge Feldpausch. I discredit his denials that he wanted to see him discharged.

b. Using company equipment to do personal work

Never before mentioned as a reason for discharging Feldpausch, is the following accusation which the Company included in the March 3, 2003 formal pleading that it prepared for Gary Smeltzer to sign (GC Exh. 16 p. 10):

16. Another example of how Marty would refuse to follow the rules involved him using the company's machining equipment to do personal work. I am sure everybody in the plant understands that you are not supposed to use the company's equipment for personal work. Also, you are not supposed to do personal work during your regular work time. I know Marty has done this.

Later in the formal pleading (GC Exh. 16 p. 10), the Company included the following statement:

25. On January 3, 2003, I was called to a meeting with Rick Rinard, Barb Peterson, and Larry Burke. At this meeting, I was asked to report anything I knew about any incident between Marty [Feldpausch], Larry [Luttig], and Jeff [Simpson]. During the meeting, I reviewed all of the information in the previous paragraphs.

Although Smeltzer made a number of changes in, and added material to this formal pleading which the Company prepared for his signature, he signed it without correcting the statement that "I was called to a meeting with Rick Rinard, Barb Peterson, and Larry Burke."

There was no purpose for the Company to call Smeltzer into a meeting on January 3, because it had previously decided to discharge Feldpausch and had planned to discharge him on that date. As indicated, Smeltzer revealed that he "volunteered" his information, testifying (Tr. 397-398):

Q. BY MR. CARROUTH: Were you ever asked to meet with Rick Rinard regarding the incidents with Larry Luttig and Jeff Simpson?

A. Actually, I volunteered the information ["because I thought it was the right thing to do"].

In any event, paragraph 16 of the March 3, 2003 formal pleading that Smeltzer signed indicates that Smeltzer reported Feldpausch's use of company equipment to do personal work to Rinard, Peterson, and Burke on January 3. That was 3 days before the three managers met with Feldpausch on January 6, when they made no mention of such an accusation. It was 4 days before the Company discharged Feldpausch on January 7, after revising its grounds for discharging him.

As found, the revised grounds the Company cited for discharging Feldpausch are included in the long, 11-paragraph January 7 discharge letter (GC Exh. 12), which states that the Company has "taken appropriate statements," referring to Luttig's and Harr's written statements and the transcript of the audiotope of Simpson's statement. Although Smeltzer testified, "I believe [his January 3 report] was documented" (Tr. 407), the Company did not have him sign a statement or make a transcript of an audiotope containing the information (Tr. 409). If the Company had intended to rely on this accusation as a reason for discharging Feldpausch, it undoubtedly would have documented the information with a written statement or a transcript.

There is nothing in the discharge letter referring to his using company equipment to do personal work.

Assuming that Feldpausch did use some kind of company machining equipment to do personal work, Smeltzer's testimony clearly reveals why no reference was made to it in the January 7 discharge letter.

5 Smeltzer testified that he witnessed Feldpausch doing this "many times [emphasis added] from the first time I was in my apprenticeship," which ended in February 2001 (Tr. 394, 398). He later testified that "when I witnessed Marty using the lathes in the back, leaving his machines not running during work hours, not break, not lunches, I told that to Jamie [Kendall], yes, I do" and "Like I said, I reported when I witnessed Marty using the company, you know, 10 resources in the back, I did report that to Jamie" (Tr. 402, 404). Yet, according to Smeltzer, Feldpausch continued to do so.

Feldpausch was a senior employee, hired in 1983 (Tr. 9). Apparently Feldpausch's performance on the job was appreciated. Lead Manufacturing Manager James Smania testified 15 that Engineer Charles Bertram had told him that Feldpausch "is very creative on his operation and he probably made several improvements to the machines." (Tr. 255.)

I find that the Company's practice of permitting Feldpausch, a senior employee, to use company property for personal work, would be the reason that Smeltzer's accusation was not 20 included in the January 7 discharge letter as a reason for Feldpausch's discharge. The Company would not discharge Feldpausch for doing something it had been permitting him to do.

I therefore find that Rinard's testimony (Tr. 451), that Feldpausch's "working on personal items on company time and equipment" was one of the reasons he discharged him, is a pretext. 25

c. "Refusal to participate in team activities"

In paragraphs 10 and 11 of the March 3, 2003 formal pleading that the Company prepared for Smeltzer's signature (GC Exh. 16 pp. 9-10), Smeltzer accuses Feldpausch of 30 refusing to participate in team activities if the job assignment "was not part of the standard operating procedure (SOP)," for example, his refusal to take part in a team project to document "inverted pit marks."

This incident involving invert pit marks occurred in November, before Simpson's term as 35 team leader expired and before the Company took away the team leaders' 75-cent extra pay, nobody on the team wanted to be team leader, and the team was dissolved in early December (Tr. 61, 371).

Simpson's team had been involved in "a turnaround with the third shift B & K's," doing 40 different projects outside the regular operating procedure (R. Exh. 5 p. 2).

Simpson explained that in "[o]ne of the projects I was involved with" in November, the "team was trying to figure out how many pip marks were actually missing on rings" and "figuring 45 out what previous operator had run those rings, the machines they run to see if there was a problem" (Tr. 371).

Obviously, this quality control or investigative work was not part of Feldpausch's regular job. Simpson admitted that when Feldpausch told him that "it's not written in the SOPs, and I'm not doing it," he said "fine, if you don't want to do it, fine." At the time, neither Supervisor Kendall 50 nor Plant Manager Rinard found any fault with Feldpausch insistence on doing his regularly assigned work. (Tr. 372.)

There is no evidence of any work that Feldpausch was unwilling to do, besides work he was not required to do on the special projects that Simpson was involved in, nor evidence of any other way that he refused to participate in team activities.

5 I find that under these circumstances, the Company's contention that one of the reasons for Feldpausch's discharge was his refusal to participate in team activities, is a pretext.

d. Opposing work during breaks

10 The Company undoubtedly had prior notice of Smeltzer's accusation in paragraph 8 of the March 3, 2003 formal pleading that the Company prepared for his signature (GC Exh. 16 p. 9), which states:

15 8. For example, during the time I worked in the B and K area with Marty, he did not like the fact that I was working through my breaks. I was working through breaks in order *to help operations as much as possible and to be as productive as I could*. Marty complained that I was going to raise the parts per hour (pph) rate if I continued to work through breaks. . . . To stop me from working through breaks, Marty *contacted an electrician and told him that I was going to cause problems with the maintenance on the machinery* by not allowing it to have downtime during breaks. As a result the electrician come out to my work area and shut down my machine so that I could not work. [Emphasis added.]

25 Regarding this accusation, Smeltzer testified that on one occasion when he was working through lunch (Tr. 399):

30 I knew that Marty had a problem with it because he was shaking his head and he said something to me when he walked away. So I went to the [supervisors] office to tell Jamie [Supervisor Kendall] that I was going to run through lunch so there would be no misunderstanding and, before I even walked out the door . . . one of the electricians that Marty takes his break and lunches with . . . come down and shut down all my machines.

35 Undoubtedly Smeltzer, who had gone to the supervisors office to get Kendall's approval, would have had no reason not to report the machinery shutdown to Kendall (who did not testify).

40 Rinard, when testifying about what Smeltzer reported in the January 3 meeting, admitted (Tr. 441) that Smeltzer only suspected that Feldpausch caused the shutdown of the machines. He testified that Smeltzer reported that Smeltzer "*felt like* [emphasis added] Marty had went back to the maintenance department to get the electricians to come and shut down his machines, so he had to stop running."

45 This accusation in the formal pleading is a misrepresentation of what Smeltzer reported in the January 3 meeting. Moreover, there is no evidence of any investigation to determine whether in fact Feldpausch caused the shutdown of Smeltzer's machinery.

50 Richard also testified (Tr. 441) that Smeltzer is "entitled to his breaks, but I ain't going to tell someone they can't work through their breaks and lunch *if they're running behind* [emphasis added] or something"—not "*to help operations as much as possible and to be as productive as I could,*" as stated in the formal pleading.

Under these circumstances, I find Rinard's testimony (Tr. 451) that "the PPH," the "interfering with production" was one of the reasons he discharged Feldpausch, is a pretext.

e. Making gun-like gesture

According to paragraph 9 of the March 3, 2003 formal pleading that the Company prepared for Smeltzer's signature (GC Exh. 16 p. 9), Smeltzer claimed that when Feldpausch did not like Smeltzer's non-smoking drive for the plant, Feldpausch asked if Smeltzer knew what we do with people who stir up the shit and gestured "like he was holding a rifle and pulling the trigger," making a "poof" sound.

Smeltzer claimed that Feldpausch "made the gesture like he was pointing a shotgun and pulled the trigger" (Tr. 400). Rinard testified that Smeltzer told him in the January 3 meeting that Feldpausch "acted like he was pointing a gun *at him* [emphasis added] and pulling the trigger and said . . . poof and walked away. And, in today's society, that really concerns me when someone would do that." (Tr. 439-440.) Neither Smeltzer nor Rinard asserted that the purported gesture was threatening.

There is no reference to a gun-like gesture in the Company's January 7 discharge letter. Moreover, I discredit Smeltzer's claim that Feldpausch made the gun-like gesture. Feldpausch credibly testified on rebuttal (Tr. 510):

Q. Did you ever do anything like that?

A. No. No. That hilarious. Anybody who knows me knows I don't do stuff like that.

I find that Rinard's testimony that the "nonsmoking which led to the shotgun incident" was one of the reasons he discharged Feldpausch, is a pretext.

I also find that the other belated reasons that Rinard claimed in his testimony (Tr. 451) for discharging Feldpausch and also mere pretexts.

f. Feldpausch's "confrontation" with Luttig

Concerning Feldpausch's December 19 conversation with Luttig at Simpson's workplace, paragraph 19 of the March 3, 2003 formal pleading that Smeltzer signed states (GC Exh. 16 p. 11):

19. . . . I observed a confrontation between Marty Feldpausch, Larry Luttig, and Jeff Simpson. Because the machinery was running, I could not hear what was being said. . . . When Marty approached them, he was upset. . . . The confrontation . . . lasted for about 3 to 5 minutes. After Marty left the work area, Larry was visibly upset.

When called as a defense witness, Smeltzer claimed that he was 6 feet from them, that Feldpausch "looked heated," was using "a lot of hand gestures," and "seemed agitated, upset" (Tr. 385-386).

To the contrary, Feldpausch credibly testified that Smeltzer was two rows of machines away, and "I believe that the very, very closest that Gary Smeltzer could have possibly been is approximately 30 feet away" (Tr. 510). I discredit Smeltzer's claim that he was only 6 feet away, that Feldpausch was upset, looked heated, and used a lot of hand gestures, and that Luttig seemed agitated and upset.

I find that the Company included this statement in the March 3, 2003 formal pleading that Smeltzer signed, to corroborate the Company's false statement in the January 7 discharge letter that Feldpausch was "creating a hostile environment."

3. Company's motivation for belated March 3, 2003 defenses

By the time the Company submitted its March 3, 2003 position letter, with the formal pleadings signed by employees Larry Luttig, Jeffrey Simpson, and Gary Smeltzer attached, it had succeeded in defeating UAW's latest organizing campaign at the St. Johns plant by its January 7 discharge of Feldpausch, the leading union organizer.

As revealed in the March 3, 2003 formal pleading the Company prepared for Luttig's signature, "[T]here have been several union drives in the Dana St. Johns plant" (GC Exh. 16 p. 21, par. 7). Similarly, paragraph 27 in the March 3, 2003 formal pleading the Company prepared for Smeltzer's signature refers to "several" prior union campaigns. It states (GC Exh. 16 p. 12):

27. During the time that I have worked in Dana St. Johns, there have been *several* [emphasis added] union campaigns. However, at the time Marty Feldpausch was terminated, there was no union drive or activity in the plant.

Before signing the formal pleading, Smeltzer crossed out and replaced the word "several" with the word "two." He was referring to the two 2002 campaigns, the first begun in March and the second, which was reactivated in early December and became active after Feldpausch's January 7 discharge. Smeltzer added to paragraph 27 the following two handwritten sentences:

The second union drive occurred *due to Marty's termination*. This *2nd attempt failed* due to employees' strong beliefs that the PLT [plant leadership team] was justified in doing so. [Emphasis added,]

Thus, Smeltzer revealed that the active union campaign that resumed after Feldpausch's termination failed because the Company discharged Feldpausch—the leading union organizer, before he succeeded in advancing the Union's reactivated organizing campaign by discrediting Luttig's rumors that his father-in-law, a well-respected UAW member and community leader where many of the employees live, was against a union at the plant.

Having succeeded in defeating the Union again, the Company was faced on March 3 with the discriminatory termination allegation in the Union's February 3, 2003 charge in this case and the problem of defending its shifting reasons for discharging Feldpausch.

As found, Plant Manager Rinard had told Feldpausch on December 19 that "You told Mr. Luttig that we'll settle this tonight and that is a threat, and I won't tolerate it in my shop. . . . You are suspended until further notice." Rinard then assured Feldpausch that "This has nothing to do with . . . your idea log" and "This has only to do with what happened out on the shop floor." Later, in the January 6 meeting, the day before the discharge, Rinard, Human Resources Manager Peterson, and Manufacturing Manager Fandel agreed that his idea log was not involved, and Peterson assured Feldpausch that the disciplinary matter involved only what happened on the shop floor in his conversation with Luttig.

After the January 6 meeting, in which Feldpausch produced the fax confirming his continuing union activity, the Company decided to change its position and to assert additional reasons for discharging him.

By 11 o'clock the next morning, January 7, the Company had prepared its 11-paragraph discharge letter, citing Feldpausch's so-called "mocking and abuse of the Idea System," as well as other conduct away from the shop floor, as additional reasons for the discharge.

Then on March 3, 2003, faced with the weakness of its defenses because of its shifting reasons on January 7 for discharging Feldpausch, as well as its indefensible claim that Feldpausch was not engaging in any union activity, the Company again changed its position.

5 The Company attached to its March 3, 2003 position statement the formal pleading it had prepared for Smeltzer's to sign, giving the Company's version of Smeltzer's January 3 volunteered oral accusations against Feldpausch. It had failed to have Smeltzer sign a statement or to have an audiotape transcript made of these accusations, and had failed to cite
10 any of the accusations in its January 7 discharge letter as reasons for discharging Feldpausch.

The Company now cites some of its version of the oral accusations as reasons for its discharging Feldpausch, further shifting reasons for the discharge.

G. Denials of Any Shifting of Reasons for the Discharge

15 The Company contends in its brief (at 30-34) that "Dana's Reasons for Terminating Feldpausch Are Not Shifting Reasons" and contends (at 31):

20 While "the Board has long held that shifting reasons constitute evidence of discriminatory motivation," *U.S. Coachworks, Inc.*, 334 NLRB 955 (2001), Dana's reasons for terminating Feldpausch have remained consistent through the course of this charge and are not shifting reasons.

The Company argues in its brief (at 32):

25 The termination letter was *very general* [emphasis added] and simply informed Feldpausch in deciding to terminate his employment, "we have considered the fact that multiple rules and/or policies have been violated . . . [and] we have considered the impact of your conduct on other employees in the workplace in general." . . . Therefore, it
30 is impossible for the General Counsel to use this termination letter as evidence that, in its decision to terminate Feldpausch, the Company did not rely on all the information discovered during its investigation.

35 I reject, as untenable, the Company's contention that because of the "very general" explanation for the discharge in the January 7 discharge letter, the Company did not shift its reasons for the discharge. Also as found, the Company's purported "investigation" was merely a formality.

40 The Company ignores Feldpausch's undisputed, credited testimony that after Plant Manager Rinard suspended him in the meeting on December 19, Rinard said, "This has nothing to do with . . . your idea log. This has only to do with what happened out on the shop floor." The Company also ignores Feldpausch's undisputed, credited testimony that in the meeting on January 6, Rinard, Peterson, and Fandel agreed that his idea log did not have anything to do
45 with the disciplinary matter, and Peterson told him that it only had to do with what happened on the shop floor in his conversation with Luttig.

The Company clearly shifted its reasons for discharging Feldpausch when it stated in the January 7 discharge letter that his idea log and other conduct away from the shop floor were reasons for his discharge.

50 Therefore, even if Smeltzer's January 3 oral accusations against Feldpausch were included in the "very general" wording of the January 7 discharge letter, the accusations would

merely be additional shifting reasons for the discharge.

Moreover, as found, the Company on December 19, as a pretext, authorized Rinard to suspend and discharge Feldpausch after the formality of an investigation, to rid the plant of this leading union organizer and stop his organizing efforts.

H. Concluding Findings

This case arose late on December 19, about 11:20 p.m., when Plant Manager Rinard suspended Feldpausch, the leading employee organizer, for telling Luttig, a leading opponent of the Union—in a conversation early that morning on the December 18–19 third shift at the work station of antiunion employee Simpson—that “we’ll settle this tonight and that is a threat, and I won’t tolerate it in my shop,” referring to settling Luttig’s rumors that his father-in-law was making derogatory statements about the Union.

Luttig had been giving Rinard “updates” on Feldpausch’s union activity, by reporting Feldpausch’s efforts to advance the Union’s organizing campaign by obtaining information to discredit Luttig’s rumors about his father-in-law—a well-respected UAW member and community leader where many of the employees live—for the obvious purpose of getting more union cards signed.

As found, the Company seized on Rinard’s false claim of a threat and authorized Rinard on December 19 to suspend and, after the formality of an investigation, to discharge Feldpausch, to rid the plant of this leading union organizer and stop his organizing efforts.

The evidence is clear that neither Luttig nor Simpson believed at the time that Feldpausch had threatened Luttig. Soon after the conversation, both employees went to the supervisors office where, as Luttig admitted, he told Supervisor Kendall that “we are not filing a formal complaint [against Feldpausch], we are not trying to tattle on him.” Of course, if Feldpausch had threatened him, Luttig would have reported it to Kendall (who did not testify).

In the Company’s January 7 long, 11-paragraph discharge letter, it omitted any reference to this purported threat. Instead, as found, it has asserted shifting reasons for discharging Feldpausch in the discharge letter and many additional shifting reasons in the attachments to its March 3, 2003 position statement and its brief, as pretexts.

I agree with the counsel for the General Counsel, in their brief (at 3, 28, 31), that (1) the Company’s “reliance on Plant Rules 16, 17 and 18, and the Workplace Violence Rule, clearly is a pretext” for discharging Feldpausch, (2) the Company’s “Shifting defenses provides further evidence that the *true* reason for Feldpausch’s discharge was his union activity,” and (3) the previous antiunion comments and conduct of supervisors and the pretextual and “shifting defenses for the discharge further suggest that Feldpausch’s discharge was the result of union animus.”

Despite the evidence to the contrary, the Company contends in its brief (at 3, 1922) that it had no knowledge that Feldpausch was engaged in union activity before it suspended and discharged him.

Therefore, under *Wright Line*, 251 NLRB 1083, enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (21982); approved in *NLRB v. Transportation Management Corp.* 462 U.S. 393 (1983), this is a dual-motive case, in which the first issue is whether Feldpausch was engaged in union activity in his December 19 conversation with Luttig and that this protected

conduct was a motivating factor in the Company's decision to discharge him.

Compare cases, such as *Shamrock Foods Co. v. NLRB*, F.3d (D.C. Cir. 2003), 173 LRRM 2454, 2458-2459 (2003), in which the employer has discharged the employee because of alleged misconduct "in the course" of admitted protected activity and in which the Board applies the Supreme Court analysis in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

I find that the evidence shows Feldpausch was engaged in union activity on December 19 and that the Company suspended and discharged him on that date as the result of its union animus. I therefore find, under *Wright Line*, that the General Counsel has satisfied the initial burden of proof that Feldpausch's union activity was a motivating factor in the Company's decision to discharge him.

Thus, the burden of proof, under *Wright Line*, shifts to the Company to show that there were other reasons that have caused the discharge even if there were no protected activity. *Santa Maria El Mirador*, 340 NLRB No. 84, slip op. at 4 (2003).

As found, all the other reasons that the Company cites for the discharge are shifting reasons and pretextual. Therefore I find that Company has failed to meet that burden.

I find that the Company discriminatorily suspended Feldpausch on December 19, 2002 and discharged him on January 7, 2003 because of his union organizing activity, violating Section 8(a)(1) and (3) of the Act.

Conclusions of Law

By discriminatorily suspending and discharging Feldpausch for engaging in union organizing, the Respondent Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Dana Corporation d/b/a Dana Perfect Circle, St. Johns, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for union organizing on behalf of the United Auto Workers or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Martin Feldpausch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Martin Feldpausch whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in St. Johns, Michigan copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2002.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court Of Appeals Enforcing an Order of the National Labor Relations Board."

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C. January 8, 2004

Marion C. Ladwig
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for union organizing for the United Auto Workers or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Martin Feldpausch full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Martin Feldpausch whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Martin Feldpausch, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

DANA CORPORATION d/b/a
DANA PERFECT CIRCLE

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.